TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 14

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

ROBERT FORTIER, ET AL.

ON WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 12, 1951.

CERTIORARI GRANTED MAY 7, 1951.

SUPREME COURT OF THE UNITED STATES

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INDEX

1 [Caption omitted]

In United States District Court

Civil Action, File No. 745

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT FORTIER, ET AL., DEFENDANTS

2 COMPLAINT

(Filed November 9, 1948)

COUNT I

Plaintiff alleges that:

1. Jurisdiction of this action is conferred upon this Court by Section 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A., App. Sec. 1821 et seq.), and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 41).

2. The defendant, Robert Fortier, is a resident of this District, and the defendants, Vincent Marino and Antonio Marino, are residents of the District of Massachusetts; and said defendants at all times material to this action were partners doing business as Modern Building Company.

3. Pursuant to the provisions of Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A., App. Sec. 631 et seq.), and Executive Orders thereunder, the Civilian Production Administration issued Priorities Regulation 33 (11 F.R. 601, 4085). The Housing Expediter, pursuant to the Veterans' Emergency Housing Act of 1946, issued Housing Expediter Priorities Order 1 (11 F.R. 9507) which delegated to the Civilian Production Administration the powers and authority conferred upon the Housing Expediter by Sections 4 and 7 of said Act. The Civilian Production Administration exercised said delegation of authority in the issuance of an Amendment of Schedule A to Priorities Regulation 33, dated August 27, 1946, and said Regulation was thus continued in effect under both the Veterans' Emergency Housing Act of 1946 and the Second War Powers Act. Further, by Housing Expediter Priorities Order 5 (12 F.R. 2111), and Executive Order 9836 (12 F.R. 1939), the Housing Expediter adopted, ratified, confirmed and continued in effect said Priorities Regulation 33, and that said Regulation has been in effect at all times material to this action.

3 4. Plaintiff brings this action to enforce compliance with the Veterans' Emergency Housing Act of 1946 (Public Law 388—79th Congress) and regulations issued thereunder.

5. Section 944.54(g) of said Priorities Regulation 33 provides that no person may sell any dwelling built under said Regulation for more than the approved maximum sales price.

6. Pursuant to the provisions of Priorities Regulation 33, the defendant, Vincent D. Marino, acting on behalf of the Modern Building Company, applied for and received authorization and priorities assistance under FHA Project Serial No. 88-024-29, approved September 9, 1946, for the construction of two dwellings at the sites now designated as:

66 Crystal Avenue, Derry, New Hampshire
68 Crystal Avenue, Derry, New Hampshire

A photostatic copy of the aforementioned application and approval is attached hereto, marked Exhibit "A", and made a part hereof.

7. Each of the dwellings described in paragraph 6 of this complaint, was subject to a maximum sales price as approved by the Federal Housing Administration, of $8,350.

8. Pursuant to said authorization and priorities assistance, the defendants, constructed the dwellings located at 66 and 68 Crystal Avenue, Derry, New Hampshire.

9. On or about November 12, 1947, the defendants sold the dwelling at 66 Crystal Avenue, Derry, New Hampshire, to James H. Buckey for $12,800.00 and thereby violated said Act and Regulation in that the defendants sold said dwelling for a sum which was $4,450.00 in excess of the approved maximum sales price.

10. On or about December 4, 1947, the defendants sold the dwelling at 68 Crystal Avenue, Derry, New Hampshire, to Deane C. Tasker for $12,000.00 and thereby violated said Act and Regulation in that the defendants sold said dwelling for a sum which was $3,650.00 in excess of the approved maximum sales price.

COUNT II

11. The allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 are realleged and incorporated herein and made a part hereof, the same as if fully rewritten herein.

12. Section 944.54(e) of said Priorities Regulation 33 provides that a builder who obtains authorization and priorities assistance to construct a dwelling under said Regulation must construct said dwelling in accordance with the description and specifications contained in the approved application. Specifications in instant case attached as "Exhibit B".

13. With respect to the dwelling located at 66 Crystal Avenue, Derry, New Hampshire, the defendants violated the provisions of said Act and Regulation by failing to construct said dwelling in accordance with the description and specifications contained in the application as approved by the Federal Housing Administration in

the following respects, the value of said items at the time said dwelling was completed being the same as herein designated:

Garage unpainted	$ 75.00
No laundry trays	35.00
No landscaping	100.00
Bathroom unfinished	200.00
No sidewall light fixtures in living room	15.00

that the defendants sold said dwelling on or about November 12, 1947, to James H. Buckey for the sum of $12,800.00.

14. By virtue of the foregoing, the defendants received from the purchaser the sum of $425.00 to which they were not entitled under said Act and Regulation.

15. With respect to the dwelling located at 68 Crystal Avenue, Derry, New Hampshire, the defendants violated the provisions of said Act and Regulation by failing to construct said dwelling in accordance with the description and specifications contained in the application as approved by the Federal Housing Administration in the following respect, the value of said item at the time said dwelling was completed being the same as herein designated:

No laundry trays	$35.00

that the defendants sold said dwelling on or about December 4, 1947 to Deane C. Tasker for the sum of $12,000.00.

16. By virtue of the foregoing, the defendants received from the purchaser the sum of $35.00 to which they were not entitled under said Act and Regulation.

WHEREFORE, the plaintiff demands:

A. A mandatory injunction requiring the defendants, Robert Fortier, Vincent Marino and Antonio Marino, to make restitution to James H. Buckey in the sum of $4,875.00.

B. A mandatory injunction requiring the defendants, Robert Fortier, Vincent Marino and Antonio Marino, to make restitution to Deane C. Tasker in the sum of $3,685.00.

C. Such other relief as may be just and equitable.

DENNIS E. SULLIVAN,
United States Attorney,
District of New Hampshire.

Dated at Concord, New Hampshire, 9th day of November, 1948.

(Exhibits A and B omitted from the Transcript of Record by leave of the United States Circuit Court of Appeals for the First Circuit.)

In United States District Court

ANSWER OF DEFENDANTS, VINCENT D. MARINO AND ANTONIO MARINO, AS AMENDED, AND DEMAND FOR JURY TRIAL

(Filed November 29, 1948, Amended September 28, 1949)

Vincent D. Marino and Antonio Marino, answering say:

1. They admit the allegations of paragraph 1 insofar as reference to the Judicial Code is concerned, but deny that this Court has jurisdiction over the controversy here involved insofar as that jurisdiction is asserted to rest on Section 7(c) of the Veterans' Emergency Housing Act of 1946, which was repealed prior to the commission of the Acts here complained of.

2. They admit the allegations set out in Paragraph #2, except that they deny that the defendants were partners doing business as Modern Building Company.

3. They neither admit nor deny the allegations set out in Paragraph #3, but leave the plaintiff to its proof.

4. They deny the allegations set out in Paragraph #4.

5. They neither admit nor deny the allegations set out in Paragraph #5, but leave the plaintiff to its proof.

6. They neither admit nor deny the allegations set out in Paragraph #6, but leave the plaintiff to its proof.

7. They neither admit nor deny the allegations set out in Paragraph #7, but leave the plaintiff to its proof.

8. They neither admit nor deny the allegations set out in Paragraph #8, but leave the plaintiff to its proof.

9. They deny the allegations set out in Paragraph #9, so far as they relate to the defendants Vincent D. Marino and Antonio Marino and have no knowledge as they relate to defendant Robert Fortier.

10. They deny the allegations set out in Paragraph #10, so far as they relate to the defendants Vincent D. Marino and Antonio Marino and have no knowledge as they relate to defendant Robert Fortier.

11. The answers to Paragraphs 1, 2, 3, 4, 5, 6, 7, and 8, are realleged and incorporated herein and made a part hereof, the same as if fully rewritten herein.

12. They neither admit nor deny the allegations set out in Paragraph #12, but leave the plaintiff to its proof.

13. They neither admit nor deny the allegations set out in Paragraph #13, but leave the plaintiff to its proof.

14. They deny the allegations set out in Paragraph #14, so far as they relate to the defendants Vincent D. Marino and Antonio

Marino and have no knowledge as they relate to defendant Robert Fortier.

15. They deny the allegations set out in Paragraph #15, so far as they relate to the defendants Vincent D. Marino and Antonio Marino and have no knowledge as they relate to defendant Robert Fortier.

16. They neither admit nor deny the allegations set out in Paragraph #16, but leave the plaintiff to its proof.

Further answering, the defendants Vincent D. Marino and Antonio Marino aver:

a. On or about July of 1946, the defendants Vincent D. Marino, Antonio Marino and Robert Fortier entered upon a joint venture or undertaking whereby each of the parties were to pay equal sums of money into a common fund to be held by the defendant Fortier, who was to pay for the expenses of building two houses only, sell them, and after retaining the sum of $500.00 for himself as the agreed value of the lot of land upon which the houses were to be built, and after paying the defendants Antonio Marino and Vincent D. Marino their regular salary for doing the carpenter work upon said buildings, they were to share any profit equally.

b. That on August 21, 1946, the defendant Vincent D. Marino applied to the Civilian Production Administration for authorization to build the aforementioned buildings and received said authorization and commenced construction of said buildings.

c. That the said defendants Vincent D. Marino and Antonio Marino furnished their money as agreed upon and did the carpenter work.

d. That the said Robert Fortier had charge of the books of the said undertaking and conducted the sale of said houses.

8 e. That the said undertaking ceased when the second building was partially completed and the defendants are without any knowledge of the costs of the construction, of the sale prices or of the completion of the second house, since that was all done by the defendant Robert Fortier without the consent of the defendants Antonio Marino and Vincent D. Marino, and although they have asked the defendant Robert Fortier for an accounting of said transactions, the said Robert Fortier has refused to account to them.

f. That it would be inequitable to the defendants Vincent D. Marino and Antonio Marino if the injunction were issued and would result in an unjust enrichment to the purchasers of the buildings.

WHEREFORE, the defendants Vincent D. Marino and Antonio Marino pray:

1. That the foregoing bill be dismissed.

2. That a jury trial be had on all questions triable by a jury, including but not limited to the questions of the cost of the construction of the buildings, the fair value of the buildings at the time of the sale and at the present time.

3. Such other relief as may be just and equitable.

VINCENT D. MARINO,
ANTONIO MARINO,
By their Attorneys, GREEN, GREEN AND ROMPREY,
By MYER GREEN.

Dated at Manchester, New Hampshire, Twenty-seventh day of November, 1948.

In United States District Court

ANSWER OF DEFENDANT, ROBERT J. FORTIER, AS AMENDED AND DEMAND FOR JURY TRIAL

(Filed November 29, 1948, amended September 28, 1949)

Now comes Robert J. Fortier, defendant herein, and for his answer, says:

I

He admits the allegations of Paragraph 1 insofar as reference to the Judicial Code is concerned, but denies that this Court has jurisdiction over the controversy here involved insofar as that jurisdiction is asserted to rest on Section 7(c) of the Veterans' Emergency Housing Act of 1946 which was repealed prior to the commission of the Acts here complained of.

II

He admits the allegations of paragraph 2, except the last clause thereof, and with reference thereto this defendant alleges that the defendants Marino induced this defendant to become a joint adventurer with them in the building of two houses, but that he was and is not otherwise associated with the defendants Marino as a partner in Modern Building Company.

III

He neither admits nor denies the allegations of paragraph 3, but leaves the plaintiff to its proof.

IV

He denies the allegation of paragraph 4.

V

He neither admits nor denies the allegations of paragraphs 5, 6, 7, and 8 but leaves the plaintiff to its proof.

VI

He denies the allegations of paragraphs 9 and 10 insofar as they relate to this defendant.

VII

The answers to Paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the complaint are realleged in answer to paragraph 11 of the complaint, the same as if fully rewritten here.

10

VIII

He neither admits nor denies the allegations of paragraphs 12 and 13 but leaves the plaintiff to its proof.

IX

He denies the allegation of paragraph 14 insofar as it relates to this defendant.

X

He neither admits nor denies the allegations of paragraph 15, but leaves the plaintiff to its proof.

XI

He denies the allegation of paragraph 16 insofar as it relates to this defendant.

And further answering, the defendant Robert J. Fortier, says:

XII.

The joint venture between himself and the defendants Marino consisted of an oral agreement that each would contribute $500 to provide initial working capital; that the defendant Fortier would procure the building lots and arrange further financing; that the defendants Marino would construct two houses thereon; that the houses would be sold; and that the profits therefrom would be divided between the three defendants after payment of wages to the defendants Marino and payment for the land to this defendant.

XIII

The defendant Vincent D. Marino applied for authorization and priorities assistance on, to wit, August 21, 1946, pursuant to Priorities Regulation 33 in effect on August 21, 1946, and, upon securing the said authorization, the defendants Marino commenced construction of the two houses referred to in the complaint.

11

XIV

That the defendant Fortier borrowed $13,600 upon his personal note given to the Manchester Federal Saving and Loan Association on October 2, 1946, and that the proceeds of this loan, and $1,500 contributed by the three defendants, were used to pay part of the cost of construction of the two houses referred to in the complaint.

XV

That the defendant Fortier contributed further sums approximating and being not less than $13,712.95 which were used by him to complete the construction of the two houses referred to in the complaint.

XVI

That the total sums of money actually expended by the defendant Fortier for the construction of the two houses, plus the $1,000 contributed by the defendants Marino for that purpose, are not less than $28,648.62.

XVII

That the two houses were conveyed and disposed of and as a result thereof the total gross sum of money received therefor was $24,800.

XVIII

That the dwelling now owned by James H. Buckey had a fair market value of $12,800 when sold to him and now has a fair market value not less than $12,800.

XIX

That the dwelling now owned by Deane C. Tasker had a fair market value of $12,000 when sold to him and now has a fair market value not less than $12,000.

12

XX

That the Federal Housing Authority, which established the maximum sale price of $8,300 placed upon these houses on September 9, 1946, subsequently to their being built and prior to their sale to the said Buckey and Tasker in November and December 1947 appraised

their fair market values as not less than $12,500 and $11,100 respectively.

XXI

That it would be inequitable to the defendant Fortier and would unjustly enrich the said Buckey and Tasker if the mandatory injunctions were issued.

WHEREFORE the defendant Fortier prays:

A. That the petition be dismissed.

B. For such other and further relief as may be just and equitable.

ROBERT J. FORTIER,
By His Attorneys McLANE, DAVIS, CARLETON & GRAF,
STANLEY M. BROWN.

The defendant Robert J. Fortier demands a jury trial on all issues triable by jury.

ROBERT J. FORTIER,
By His Attorneys McLANE, DAVIS, CARLETON & GRAF,
STANLEY M. BROWN.

In United States District Court

OPINION

(Filed February 24, 1950)

A. J. C.

CONNOR, J.:

This is an action brought by the United States of America to enforce compliance with the Veterans' Emergency Housing
13 Act of 1946 (Public Law 388, 79th Congress), and regulations issued thereunder, the pertinent one being Priority Regulation 33 promulgated under Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A. App. 631, et seq.), and later adopted under the Veterans' Emergency Housing Act of 1946. Jurisdiction is conferred by Section 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C. App. 1821, et seq.), and Revised Judicial Code (62 Stat. 869, Title 28 U.S.C. 1345).

On August 21, 1946, the defendants made application for a residential construction permit under Priorities Regulation 33. The application was approved by the Federal Housing Administration, and as approved authorized the construction of two five-room houses, without garages or breezeways, and established a maximum sales

price of $8350 on each unit. Upon approval of the application, a project serial number and an HH preference rating were assigned. Construction of one house was completed in August of 1947 and the second in January of 1948. During the process of construction certain additions were made in deviation from the approved plans and specifications. The first of the two houses was sold on December 4, 1947, for the price of $12,000, and the second on November 12, 1947, the price being $12,800. It is upon these sales that the complainant alleges a violation of Section 5 of the Act, and prays that mandatory injunctions issue requiring the defendants to make restitution to the respective purchasers of the sums received in excess of the maximum sales price and for additional amounts because of alleged failure to complete construction in accordance with the specifications.

The Second War Powers Act and the Veterans' Emergency Housing Act (in part) had been repealed prior to both sales.

In considering the issues of law raised by the foregoing facts which are not in substantial dispute, there is presented at the outset the question of whether the sales were in fact violations of the Act. It is the contention of the complainant that "the repeal of the 1946 Act was accomplished according to and by virtue of
14 Section 1 (b) of the Act itself, and that it was not intended that Section 5 should be repealed."

Section 1 (b) of the Veterans' Emergency Housing Act provides:

> "The provisions of this Act, and all regulations and orders issued thereunder, shall terminate on December 31, 1947, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the provisions of the Act are no longer necessary to deal with the existing national emergency, whichever date is the earlier."

Section 5 of the same Act states:

> "Notwithstanding any termination of this Act as contemplated in section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as the rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

Section 1(a) of the Housing and Rent Act of 1947 is as follows:

> "Section 1. (a) Sections 1, 2(b) through 9, and sections 11 and 12 of Public Law 388, Seventy-ninth Congress, are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment

of this Act are hereby returned to the Treasury: Provided, That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect."

In urging this proposal, the complainant overlooks the fact that the 1946 Act was not repealed by the happening of either of the contingencies designated in Section 1(b), but by the force and effect of Section 1(a) of the 1947 Act, wherein, with the exception of certain sections not here material, there is specific repeal. The claim is predicated upon the theory that Section 1(a) and the provisions of Section 5 were in effect saving clauses which extended the operation of the statute. This position is unsound, because Section 5 was expressly repealed by Section 1(a) of the 1947 Act. *United States* v. *Carter, et al.*, 171 F. 2d 530. While it is true that "any allocation made or committed, or priorities granted for the delivery, of any housing materials or facilities ' under the authority of the 1946 Act were to remain in full force and effect possibly to aid completion of construction already commenced under that Act, the statute is silent as to any reenactment barring sale beyond the ceiling price. The complainant cites in support of its position certain unreported cases which hold (a) that a sale consummated subsequent to the repeal of the 1946 Act can be treated as a violation and ground for restitution if the agreement to sell antedated repeal, and (b) that an agreement to build would similarly permit an injunctive order. *Pruitt* v. *Litman*, D.C., E.D. Pa., February 28, 1949; *Katz* v. *Litman, et al.*, D.C., E.D. Pa., Civil Action No. 8225, March 25, 1949; *United States* v. *Tyler Corporation*, Civil Action No. 348, D.C., E.D. Virginia, April 26, 1949. No case has been brought to the attention of the court, however, where the facts are comparable to the instant case, and in the citations offered the reasoning is not clear as to the basis for the conclusions reached. It would appear that the above holdings are grounded upon the rather doubtful premise that liability arose because a contractual relation was created (1) between the Government and the builder in the granting of the application for priorities, or (2) in the agreement of sale made by and between the builder and the purchaser prior to repeal. I cannot adopt the proposal that an enforceable contractual relationship was created by the granting of the application by the Government. The language of the statute negates the idea that a contractual basis was intended or could be formulated; its whole purpose was remedial and regulatory, and a departure from the regulations would permit the invocation of

sanctions or penalties, either civil or criminal. It was plainly
16 a restriction of the private rights of the individual, to be relaxed by grants, here represented in the priorities. Respecting the second proposal that a surviving liability could be construed under an agreement of sale made by and between the builder and the purchaser prior to repeal, no liability could possibly survive, for the contract, if such it was, would be illegal, unenforceable, and devoid of liability. Nor can I subscribe to the application of the fiction of relating back a sale which occurred subsequent to repeal to an agreement reached prior thereto in order to constitute a violation. Upon either of these grounds the theory of contractual relation must be rejected and with it disappears any surviving liability which could be comprehended within Section 109 of Title 1 U.S.C.A. to form a basis for prosecution subsequent to repeal. Title 1, U.S.C.A., 109 provides that in the repeal of any statute such shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing Act shall so expressly provide, and the statute is to be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. Nothing in the 1947 Act undertakes to release or extinguish the foregoing, and the rule would be available to the complainant if there were any sound basis for it, but none is here presented.

It is my view that the sale itself is the violation contemplated by the statute; if it occurred prior to repeal, it could be prosecuted before or after repeal; if it occurred subsequent to repeal, it cannot be held to be a violation. Here clearly the facts necessary to constitute a violation occurred after repeal. No proviso is contained in the Act of 1947 to maintain ceilings on the sale price of dwellings, and the failure to so provide might well have been that Congress deemed the situation did not require further supervision. Whatever powers were vested in Priorities Regulation 33 of the Second War Powers Act, under which it was promulgated and later adopted and continued in effect under the Veterans' Emergency Housing Act,
would appear to have been abrogated. The Second War
17 Powers Act was repealed by the First Decontrol Act of 1947 (80th Congress, 1st Session, Public Law 29, Approved March 31, 1947, and effective June 30, 1947. The Housing and Rent Act of 1947 carries the same effective repeal date.

Accordingly, there must be judgment for the defendants, and an order to that effect will be entered.

February 24, 1950.

In United States District Court

JUDGMENT

(Entered February 27, 1950)

A.J.C.

It is considered by the Court, the Honorable Aloysius J. Connor, District Judge, that judgment be, and it hereby is entered for the defendants, in accordance with Opinion of the Court filed on the twenty-fourth day of February, 1950.

By the Court,

WILLIAM H. BARRY,
Clerk.

In United States District Court

PLAINTIFF'S NOTICE OF APPEAL

(Filed April 24, 1950)

Notice is hereby given that the United States of America, the plaintiff in the above entitled action, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in the said action on February 27, 1950.

Dated this twenty-fourth day of April, 1950.

UNITED STATES OF AMERICA,
By JOHN J. SHEEHAN,
JOHN J. SHEEHAN,
United States Attorney.

18 In United States District Court

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

(Filed May 18, 1950)

1. The District Court erred in ruling that no contractual relationship was created between the Government and the defendants by the granting of the application for priorities.

2. The District Court erred in holding that Priorities Regulation 33 was voided by the Housing Act of 1947.

3. The District Court erred in holding that the Housing Act of 1947 automatically released from the regulations imposed under the Veterans' Emergency Housing Act of 1946 all housing built under authorization and with the assistance of the latter act.

UNITED STATES OF AMERICA,
By JOHN J. SHEEHAN,
JOHN J. SHEEHAN,
United States Attorney.

In United States District Court

PLAINTIFF'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed May 18, 1950)

The United States of America, the appellant, hereby designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal from the judgment entered in the above-entitled action:

1. Complaint.
2. Answer of Defendants, Vincent D. Marino and Antonio Marino, as amended, including demand for jury trial.
3. Answer of Defendant, Robert J. Fortier, as amended, and demand for jury trial.
4. Condensed statement, in narrative form, of testimony, which statement is filed herewith.

19 5. Opinion.

6. Judgment.
7. Plaintiff's notice of appeal.
8. Statement of points on which appellant intends to rely.
9. This designation.

UNITED STATES OF AMERICA,
By JOHN J. SHEEHAN,
JOHN J. SHEEHAN,
United States Attorney.

In United States District Court

CONDENSED STATEMENT OF TESTIMONY, AS AMENDED

(Filed July 7, 1950)

The defendant, Vincent D. Marino, upon his return from military service, together with his father, Antonio Marino, both of whom had prior experience as carpenters, decided to enter the business of building contractors, in the summer of 1946. They agreed with the defendant, Fortier, to build for sale two houses in Derry, New Hampshire. Fortier was an automobile and real estate salesman and had no prior experience as a building contractor.

Fortier contributed land which he owned on Crystal Avenue in Derry, upon which street he also had his residence, as the site for the two proposed houses, and arranged for construction loans with the Manchester Federal Savings and Loan Association to provide working capital for the project.

On August 21, 1946, the defendants, as Modern Building Company, made application to the Federal Housing Administration on CPA Form 4386 for residential construction approval and

priorities rating for two units under Priorities Regulation 33, and filed blueprint plans and specifications with that application. This application was approved by the Federal Housing Administration, and, as approved, authorized the construction of two five-room houses, without garages or breezeways shown on the plans and referred to in the specifications, and established a maximum sales price of $8,350 on each unit. Upon approval of the application, a project serial number and an H H preference rating was assigned for use in accordance with PR33 in purchasing the minimum quantity of materials listed in Schedule A to PR33 required for completion of two units of the project described.

Construction of one house was completed in August of 1947, and the second house was completed in January of 1948.

During the process of construction, additions were made in deviation from the approved plans and specifications. Officials of the Federal Housing Administration inspected the project in the process of construction, observed certain of the additions being built and did not disapprove or complain about them.

The first of the two houses to be completed was sold on December 4, 1947, for a price of $12,000. Additions on this house included a staircase to the second floor, electrical wiring of the second floor, windows in the gable ends of the second floor, a one-car garage complete with driveway, and a breezeway connecting this garage and the house proper.

The second house was sold on November 12, 1947, before completion, the sales price being adjusted to $12,800. Additions on this house included a garage, breezeway, outside bulkhead to the basement, a staircase to the second floor, a dormer on the second floor, and three rooms completely finished on the second floor including windows, ceiling, asphalt tile floor, light fixtures, and heating radiators.

It was admitted that two concrete laundry trays included in the specification for each house were not provided, and that in the second house a bathroom was not finished, and loam was not spread on the lawn. The purchaser of the second house, however, admitted that he had been allowed a money adjustment because of these latter two items.

There was no contact between the defendants or any of them with either of the purchasers of the two houses until after July 1, 1947, no pre-existing agreements, and no contractual relationship or negotiation toward a sale at any price was entered into by the defendants or any of them with either purchaser prior to June 30, 1947.

It is upon these sales that the complainant alleged a violation of Section 5 of the Veterans' Emergency Housing Act of 1946 (Public Law 388, 79th Congress), and prayed that mandatory injunctions

issue requiring the defendants to make restitution to the respective purchasers of the sums received in excess of the maximum sales price, and for additional amounts because of alleged failure to complete construction in accordance with the specifications.

The defendants demanded trial by jury, and the plaintiff moved to strike the demand for jury trial, which motion, after hearing, was granted, subject to defendants' exception.

The defendants moved to abate the complaint, and to dismiss the complaint, for reasons which appear in the motions, both of which motions were denied, subject to defendants' exceptions.

The factual defense relied upon consisted of allegations that the defendants expended sums for the construction of the houses which exceeded the amounts received by way of the final sale prices, and that the houses were reasonably worth the amounts for which they were sold when sold and at the time of trial. Offers of proof related to these defenses were rejected, subject to defendants' exceptions.

In United States District Court

Material Portions of the Transcript of the Evidence as Designated by the Parties

* * * * * * * *

Mr. Branch: May it please the Court: This is an action brought by the United States of America against the defendants Fortier and the Marinos, who were doing business as the Modern Building Company, for violation of the Veterans' Emergency Housing Act of 1946, and the more subsequent Priority Regulation 33 which was promulgated under the authority vested in him by that Act to make regulations concerning priorities in the construction of houses. The Government alleges and will show that the defendants sought and received priority assistance from the Government, and that after they had obtained the priority assistance with the aid of such assistance they constructed two dwellings which were subject to sale at a maximum price in the final analysis set by the Government, and which was according to law a binding maximum sales price upon the builders. However, the Government will show that one of the houses built by these builders was sold—which was supposed to have been sold for a maximum of $8350, was sold on or about November 12, 1947 to Major James H. Buckey for the sum of $12,800; and that the second of the two dwellings in question, which also had a maximum sales price of $8350 set on it, was sold to Captain Deane C. Tasker for $12,000. The Government will also introduce evidence indicating and showing that the specifications filed and accepted by the Government in the application for priority assistance by the builders were not complied with, and that

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therefore there should be restitution made of a certain amount for failure to comply with the specifications which controlled the building of the houses. The Government seeks a mandatory injunction requiring the defendants to make restitution to the buyers of these two houses of the difference between the price for which the houses were sold and the maximum prices which had been set, plus an amount as damages for the failure to fulfill the specifications which were binding upon the builders because of the fact that they had obtained priority assistance.

With the Court's permission I will call the first witness.

* * * * * * * *

23 Testimony of WILBUR E. TEWKSBURY. Sworn.

Direct examination.

Questions by Mr. BRANCH:

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The COURT: Do you claim, Mr. Brown, that what the contractors spent is important?

Mr. BROWN: Yes.

The COURT: Why? Isn't there a ceiling placed here by the statute?

Mr. BROWN: There was when there was a statute, Your Honor, and if the Statute controls, I suppose that ceiling was still on.

The COURT: If the Statute controls, if it does control, what your contractors spent is of no importance, and if the Statute does not control, then the plaintiff has no case, anyway.

Mr. BROWN: I cannot agree, Your Honor, with your suggestion that if the Statute controls, what the contractors spent is of no importance. This is not a case where the Government is seeking future compliance with an order, or is seeking a penal execution against the contractor. This is a case in equity for restitution, and it is based on equity principle. If, in fact, my client and the other defendants in this case have already suffered a substantial loss in the building and sale of these houses, it is our position that it would be highly inequitable for this Court to order that they make an overpayment to the people who now own the houses. That is our position. That is our defense.

The COURT: What do you say to that?

Mr. BRANCH: I submit, Your Honor, that the evidence of the Crystal Motors' bank account is completely irrelevant to anything that is in this case that has been brought up in this case by our complaint or the defendant's answer.

The COURT: Why is it? You differ with Mr. Brown in his suggestion that this is wholly an equity matter?

Mr. BRANCH: Yes, I do.

The COURT: Statutory, you say?

Mr. BRANCH: Yes, statutory. It is also the contention of the government that regardless of how much the houses cost, that they were bound by the maximum price set unless they sought permission and obtained permission to increase the maximum price.

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Testimony of WILLIAM F. BAKER. Sworn.

Direct examination.

Questions by Mr. BRANCH:

Q. What is your full name, please?

A. William F. Baker.

Q. What is your occupation or profession?

A. I am Assistant District Director of the Federal Housing Administration.

Q. And your office is where?

A. Manchester, New Hampshire.

Q. What are your duties?

A. My duties are the administration of affairs of the Federal Housing Administration in New Hampshire.

Q. In the course of your office business did you receive application for priorities under the Priorities Regulati[illegible] 33 of the Veterans' Emergency Housing Act of 1946?

A. We did.

Q. Can you identify this document for me, please?

A. This CPA form 4386 is an application form used in the application for priorities assistance during that period.

Q. By whom was that application made?

A. The application was made in the name of the Modern Building Company, Box 125, Derry, New Hampshire.

Q. And by whom was it signed?

A. Signed—the application was signed by Vincent D. Marino as the signature of the owner and authorized official. His title was "Authorized Official Superintendent."

Mr. BRANCH: We offer the application.

Mr. BROWN: No objection.

The CLERK: Received and marked Plaintiff's Exhibit 3, Application for Priorities assistance, dated August 21, 1946, signed by Vincent D. Marino.

Q. Regarding Plaintiff's Exhibit 3, Mr. Baker, is there—well, first, with what kind of construction and how much construction does it deal with?

A. This deals with the construction of two buildings.

Q. Located where?

A. At Derry, New Hampshire.

Q. Does it give any other location?

A. No. Crystal Avenue, Derry.

Q. What kind of houses?

A. Two five room units.

Q. And does the Plaintiff's Exhibit 3 indicate the setting of a maximum price on those dwelling units?

A. It does.

Q. And what was the maximum price?

A. As established, $8350.

Q. That was for one or both houses?

A. For each.

Q. Again referring to Plaintiff's Exhibit 3, could you explain to the Court the significance of the project serial number which appears in the upper right hand corner, and what is it?

A. 88-024-29. I beg your pardon. The 88 was the regulation under which it was issued for the Administrative purposes. The 24 was the State number and 29 was the serial number of this application.

Q. What if any use was made of that number by the applicant for priority assistance?

Mr. BROWN: Objection. This witness honestly cannot know what use was made of it by these defendants.

The COURT: Only so far as appears on the document.

Mr. BRANCH: I think my question wasn't possibly fully phrased. I was not referring to any particular applicant; I was asking him in general what is supposed to be done,—what use is supposed to be made of that project serial number by an applicant,—by any applicant,—of what effect and what bearing has it on him.

The WITNESS: May I explain at the time, please?

Q. Yes.

A. The Federal Housing Administration was acting as an agent for the Civilian Production Administration, and what was done with the numbers, and how applicants of priority assistance having gotten the approval of our office,—what they did with it, we didn't know.

That is, I do not know,—or I do know that there were from time to time various materials were to have been ordered on a priority basis, and in some instances the houses for construction of veterans and houses to be constructed under this authority, under this approved application, were to be obtained. Some

other types of construction may have prior authority. I think that I am not competent to answer just what would be done with it, or just how.

Q. Well, can you answer this for me: Would any other priorities assistance applicant have the same number as appears on this application of the Modern Building Company?

A. No.

Q. Can you also identify this document for me, please?

A. This is Form HHA 1012, Outline Specifications, which bears the same number: 88-024-29, and undoubtedly was the number put on this document by our office as the Outline Specifications as of the houses to be constructed under this authority for priority assistance.

Mr. BRANCH: Any objection?

Mr. BROWN: No.

The CLERK: Received and marked Plaintiff's Exhibit 4, titled "Outline Specifications" dated August 21, 1946, signed "Modern Building Company, R. J. Fortier."

Q. Looking at Plaintiff's Exhibit 4, who is named as the applicant?

A. The Modern Building Company.

Q. And by whom is the specification signed?

A. The specifications are signed by the Modern Building Company, R (something) Fortier.

Q. Well, it looks like J, doesn't it?

A. Yes.

Mr. BROWN: We will admit that is R. J.

Mr. BRANCH: Thank you.

Q. Now would you again tell the Court the relation between this Outline Specifications, which is Plaintiff's Exhibit 4, and the application for Priorities Assistance, Exhibit 3?

A. By the information here, it was apparent that—it appears, at any rate, that the priorities assistance was based partly upon the Outline Specifications.

* * * * * * *

27 X Q. By the way, when you set these maximum prices,—when you do that, that price was set at a level which was supposed to give the contractor a fair profit on his operations, wasn't it?

A. Yes.

X Q. And the price was always set with that in view, that a reasonable profit was proper, and should be allowed for?

A. Yes.

X Q. And that is one element that is supposed to be taken care of by the price that your Agency set?

A. Yes.

X Q. And when you established your price, you established it upon the basis of what a competent contractor should be able to build the building for, that is correct, isn't it?

A. Yes.

X Q. And in individual cases, a contractor might not be as efficient as the other, and the cost might go up?

A. Right.

X Q. And that happened from time to time?

A. Often.

R. X Q. Just a couple of other things, Mr. Baker. From August of 1946 until the beginning of 1948 did construction costs go up, down, or did they stay about the same?

A. Construction costs were increasing constantly.

R. X Q. And whether or not the increases during the eighteen months between August of '46 and January of '48, whether that increase was substantial or slight?

A. Substantial.

R. X Q. If you assume, Mr. Baker, that at the site of these two houses, garages and breezeways were built, attached to each house, and that on one of the houses the up-stairs was finished off into three rooms with a dormer and stairs leading up to it, and on that same house that a back staircase to the basement was added in addition to anything called for on the plan, and that in that other house, although the up-stairs was not finished, a staircase to the up-stairs was added that was not required by the plan, and electrical fixtures were wired into the up-stairs,—if you assume that those things were done on these two buildings, in your opin-
28 ion would the contractors, had they applied for increases, have received them from your office?

Mr. BRANCH: I object, Your Honor.

The COURT: Wait a minute. What is your objection?

Mr. BRANCH: There is no evidence in here so far that the assumptions which he has given the witness were in effect actualities in the two particular houses involved.

Mr. BROWN: We will undertake to prove that, Your Honor.

The COURT: I thought what you were driving at was the proposition of what might be permitted. You were bound by the ceiling, weren't you?

Mr. BRANCH: That is true. I have maintained that. I haven't objected since then because I more or less gathered from the Court

at least that at present you were admitting evidence in regard to valuation. It is our contention that it is irrelevant for that reason, also,—that they were bound by the maximum price, and any extras they put in were at their own cost or expense.

The COURT: You are approaching it from an equity angle.

Mr. BROWN: That is correct. We are taking the position that if the defendants here built $15,000 houses down there which these plaintiffs in interest bought at $12,000, they are not entitled to make any sum on the transaction.

The COURT: Even though in building the $15,000 houses, you violated the statute?

Mr. BROWN: Anything we did is a matter of proof, and this witness has previously testified that on inspection it was noted that additions were being built which did not constitute anything which gave cause for complaint by the Federal Housing Authorities which were in charge of these matters. I can't believe the situation is,
29 Your Honor, that these defendants were under any technical violation in some of the regulations in failing to come back from time to time to get additional authorization. I think the evidence will so disclose. What I am asking this witness is, Assuming that they had come back, whether in his opinion as an official of the agency concerned at that time, increases would have been permitted them under those circumstances.

The COURT: I will permit it. He may answer.

The WITNESS: In the case of an authorization being issued and the contractor or owner, whichever the case may be, came back and said that the prices had changed, or "we are going to put more into the house," we would consider the facts, and if they warranted it, on the basis of the information available, we would increase the allowable maximum sales price.

R. X Q. And if what they were adding was something that was unreasonable, I suppose you would turn down the application for the increase?

A. If what they were adding, let us say, was something that was not permitted, such as a second bath for one unit, we would turn it down.

R. X Q. But if it were in a permissible area, you would consider it on the merits?

A. Yes.

Testimony of WALTER B. SUNDEEN. Sworn.

Direct examination.

Questions by Mr. BRANCH:

Q. What is your full name, please?
A. Walter B. Sundeen.
Q. Where do you live?
A. 487 Bridge Street, Manchester, New Hampshire.
Q. What is your occupation?
A. Lumber dealer.
Q. Did you at my request bring up today a part of the records kept in the usual course of your business?
A. I did.
Q. That was lumber business?
A. Yes.

Mr. BRANCH: That is the records of Mr. Sundeen.
Mr. BROWN: We have no objection at all to his testifying about them.

30 Q. Mr. Sundeen, what if anything do your records reveal with regard to purchases, if any, made by the Modern Building Company?

Mr. BROWN: Do I understand that the witness has before him his records?
Mr. BRANCH: He has some records, yes.
Mr. BROWN: His own records?
Mr. BRANCH: That is right.

Q. What you have in your hand,—what is what you have in your hand?
A. Well, this is a record of all priorities ratings.
Q. Whose is it?
A. Our records.
Q. (Second Question Back Repeated) Mr. Sundeen, what if anything do your records reveal with respect to purchases, if any, made by the Modern Building Company?
A. Well, our records show the office invoices which are kept on file.
Q. Whether or not they show any purchases by the Modern Building Company from you?
A. No. Some companies do furnish us with their own purchase orders, but some companies don't. Our records,—the only records we have is of the merchandise that was actually ordered by them and delivered.

Q. Well, does it indicate that any merchandise was ever ordered by them and delivered to them by you?

A. Oh, yes.

Q. And I show you—can you identify that, please?

A. Yes. It is our permanent record of a delivery made to their place of construction, or wherever they called for it; it is hard to indicate, but it shows that there was.

Q. Does it not indicate sale to them?

A. It indicates a sale.

Mr. BRANCH: We offer this as an exhibit.

The COURT: Well, a sale of what?

Mr. BRANCH: Well, of material. I am sorry.

The WITNESS: Yes, a sale of four windows.

Q. Well, I will wait a minute before I offer it. Now can you describe what these marks down here,—what is that?

A. Well, those marks indicate that the Modern Building
31 Company was authorized to buy these materials through the H.H. rating.

Q. And whether or not your records indicate anywhere what their number was, their priority number?

A. Well, we would have to obtain their priority number before we would make shipment.

Q. You would have to?

A. Yes.

Q. And is there anything in your records which shows a rating number and a priority number for them?

A. Oh, yes.

Q. And what is the number that you have in your records as their rating number or priority number?

A. Well, our record is 88-024-29.

Q. And to refer again to this HH on this sales slip, it indicates that at time of that sale they had already filed upon it, or does it not

A. Yes.

Q. They had filed a priority rating number with you?

A. Yes.

Q. And whether or not that had any effect in their obtaining that order of supplies from you?

A. It certainly did. In order to obtain their building materials, they would have to have an H.H. rating, and we would generally refer to the books, and of course the one in charge of that in the office knew the different accounts and knew who had H.H. ratings and who did not.

Q. And is this the book that was kept of those accounts?

A. That's right.

The CLERK: Received and marked Plaintiff's Exhibit #8, Sales Slip, Sundeen Lumber Co. to Modern Building Co., to the total amount of $18, 12/10/46.

Q. In other words, then, Mr. Sundeen, is it accurate to say that in order for them to have obtained these materials from you, they had to give you their priority rating number?

A. Definitely so.

Mr. BROWN: I suppose, Your Honor, that whether or not to get this material required an H.H. rating should be proved by the document that established the fact. Now if they are in the regulations under Schedule A or something else, I
32 think that is the way to prove it rather than this gentleman's recollection as to what or what was not on the list.

Mr. BRANCH: I am not concerned with the HH rating. I am concerned with the fact that in order to obtain supplies, they had to have a priority number, which we have submitted.

Mr. BROWN: Are you speaking about Mr. Sundeen's business policy or what was required by the law or regulation?

Mr. BRANCH: I am talking about what was required in order for the Marinos and Mr. Fortier to obtain material from Mr. Sundeen. In other words, to put it very simply, I am trying to show that the priority rating was in fact used by Fortier and the Marinos.

Mr. BROWN: I object.

The COURT: He says that isn't the way to prove it.

Mr. BROWN: The only evidence in the case as to anything secured from Mr. Sundeen was four sets of windows. Whether or not the windows went on the priority list, I don't suppose Mr. Sundeen knows of his own knowledge. I suppose it is demonstrable, if it is so, that it was obtained by means of the regulation, as to the list of materials acquired at that time.

The COURT: This prior witness indicated that the men got that priority rating.

Mr. BRANCH: Yes, the testimony is to the effect that at the time the application for priority assistance was given that a number was assigned.

The COURT: Whether or not a number was assigned?

Mr. BRANCH: I think the evidence, if you will remember, revealed that the number was 88-024-29.

The COURT: I know he spoke of a number.

Mr. BRANCH: Which is the number that appeared on the project.

The COURT: It isn't clear to me—I think there is evidence that these people did have a priority number.

Mr. BROWN: That is so.

The COURT: Now that probably doesn't answer the problem that you have raised here as to whether or not Mr. Sundeen knew that, or that the Regulations required that such a number be available in order to obtain the four sets of windows.

Mr. BRANCH: I think it is incidental——

The COURT: What are you trying to show through this witness?

Mr. BRANCH: That they did in fact use their priority job number, project number, to obtain supplies.

The COURT: Whether or not that priority rating number was necessary to obtain four sets of windows?

Mr. BRANCH: Yes, that is right.

The COURT: Does that follow, or is that a matter of proof? Are you stating that in order to obtain any sort of supplies that he must have a priority rating?

Mr. BRANCH: No, I am not, Your Honor. All I am trying to get evidence of is that these defendants were assigned a priority rating number and that that project rating number was used to obtain supplies from Mr. Sundeen.

The COURT: Rightly or wrongly?

Mr. BRANCH: Yes.

The COURT: That is, whether it is necessary or not?

Mr. BRANCH: That is right, and he has testified that the records showed that he knew that they were authorized to buy through the priority rating.

The COURT: It is Mr. Brown's point to have it established that as a matter of law it was necessary to obtain that to get these windows.

Mr. BRANCH: That is all I am trying to prove.

Mr. BROWN: May I have an exception to the question on the basis of my objection?

The COURT: What question are you excepting to?

Mr. BROWN: To the pending question, which is general in terms, and which is restricted to the building materials on the priority rating.

The COURT: Restate it so that we can have it clear just what you are asking now, Mr. Branch.

Mr. BRANCH: My question was actually a question as to what he previously testified to, so I will strike it out, it is all right with me. I was just rephrasing what he already said.

The COURT: In that case, strike out the question and answer.

Mr. BRANCH: Yes.

Q. Well, referring to Plaintiff's Exhibit 8, will you state again what the significance of the HH rating on the slip is?

A. The significance of the HH rating indicated that a priority number had been issued by the priority ratings board that we could

use, so that when we extended the ratings to the companies we bought from, we would have something to back it up with. In other words, we couldn't very well buy building materials unless we backed it up with ratings, and the only way you do that, we would have to have ratings from the ones who bought it from us.

Q. Well, whether or not the fact that there was a HH rating on that,—that they did have a HH rating, was influential in their obtaining windows?

A. That's right.

Q. Well, was it or wasn't it?

A. It was.

Mr. BRANCH: No further questions.

Cross-examination.

Questions by Mr. BROWN:

X Q. Mr. Sundeen, do you know whether or not windows were at that time on the list of materials that you could not sell except to HH priority holders? Do you know for a fact whether those windows were on such a list?

A. That I couldn't say.

X Q. Do you know where those windows went?

A. Apparently they went to the address designated.

X Q. What address is that?

A. Crystal Avenue, Derry, New Hampshire. That could be the address of the job, and sometimes it could be the address of the contractor.

X Q. And you know, do you not, in this case that is the address of both the job and the contractor? Do you know that from your records?

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A. Well, I wouldn't know that. It had to be one or the other.

X Q. And do you know whether or not Modern Building Company had more than one job going on in December of '46, when those windows were delivered?

A. No, I wouldn't know.

X Q. Do you know for a fact whether those four windows were used on the two houses involved here, or not?

A. No, we do not. We assume that they were.

Mr. BROWN: May I ask that the last phrase be stricken, Your Honor?

The COURT: Strike it out.

Mr. BROWN: That is all.

Redirect examination:

R. D. Q. Just one thing, Mr. Sundeen. These records that we are talking about that you have in your hand, do they indicate the assignment of a priority rating number to the Modern Building Company?

A. That's right.

R. D. Q. And what is that number? Look at the book.

Mr. BROWN: We admit, Your Honor, that the number that appears on the Exhibit already in was the number assigned to us.

R. D. Q. Have you any other project rating in your book in regard to Modern Building Company?

The COURT: Do I understand that each building had a rating and each project had a number?

The WITNESS: Yes. 88-024-29.

R. D. Q. Do your records reveal any other project number assigned to the Modern Building Company?

A. No.

Recross-examination:

R. X Q. Mr. Sundeen, just one question. Do you have in your records anything that you know of signed by either Mr. Fortier or Mr. Marino as to supplying them with materials that are
36 listed on Schedule A of Price Regulation 33 for two houses that they were building at 66 Crystal Avenue and 68 Crystal Avenue? Do you have anything signed by either one of them asking you to supply priority materials under that Regulation?

A. No, we have no signatures or no records in the office any more than when they would call to the office to purchase building materials, in order for us to sell them, they would have to furnish us with the priority number for that particular job.

R. X Q. And no certificate asking for materials was ever given to you signed by either Fortier or either of the Marinos, so far as you know?

A. So far as I know.

Mr. BROWN: That is all.

Mr. BRANCH: That is all, Mr. Sundeen. Thank you very much.

September 29, 1949.

Testimony of VINCENT D. MARINO. Sworn.

Direct examination.

Questions by Mr. BRANCH:

Q. What is your full name, please?
A. Vincent D. Marino.
Q. What is your occupation?
A. I am a carpenter by trade.
Q. Where do you live?
A. Lawrence, Massachusetts.
Q. Can you tell me, Mr. Marino, whether or not you were ever connected with the Modern Building Company, so called?
A. Yes, I was.
Q. And who was associated in that business with you?
A. Mr. Fortier and my dad.
Q. Your father's name being what?
A. Anthony Marino.
Q. And what construction did that company do while it was in existence?
A. Well, just those two dwellings that we have been discussing.
Q. They were built on a priority, were they?
A. Yes, they were.
Q. What is the location of the two houses that were built?
A. On Crystal Avenue.
Q. And what is the number?
A. I don't recall the exact numbers.
Q. Well, are they 66 and 68, do you know?
A. No, I am not positive as to the numbers.
Q. Are they the houses that were purchased by Capt. Tasker and Major Buckey?
A. Yes, they are.

Mr. BRANCH: You may inquire.

Mr. GREEN: We will reserve our questioning until the defendant's case, Your Honor.

Mr. BRANCH: May it please the Court, the Government rests.

* * * * * * *

Mr. BROWN: If the Court please, we will be as brief as we can in our defense. We propose to put the witness on to establish that the cost of building these two houses to these defendants was in excess of $27,000 for the two houses which were sold for $24,800. We propose to also show that the materials that went into the construction

of the houses and the workmanship was above that required by the specifications, with the result that a more costly and more valuable house was constructed than was required under these regulations. We will also have a witness who will testify as to the dates of completion, which may not be clearly on the record at this time. And we will have some testimony concerning the value placed upon these houses by the Federal Housing Administration and the Veterans' Administration after the houses were completed, and before these sales took place.

* * * * * * *

Testimony of VINCENT R. SWANBURG. Sworn.

Direct examination.

Questions by Mr. BROWN:

* * * * * * *

Q. Let me ask you first, sir, what would it have cost in your opinion for a competent contractor to have built a house up to the specifications,—the requirements of the specifications?

Mr. BRANCH: I object, Your Honor, on the ground it is irrelevant in any way to this case.

38 The COURT: I have some doubts as to its materiality. You are urging this on the proposal of equitable relief, are you?

Mr. BROWN: If Your Honor please, I would like to develop what Mr. Swanburg, whom I believe to be competent to testify on the matters,—what he says in his opinion a fair cost to a competent contractor should have been. First, to build the portion of the houses for which the approval was given; Two, the specifications which were filed; then how much it should have cost a reasonably competent contractor to have built that section of the structures as that section was actually constructed, and Third, to ask him for his opinion as to the probable cost to a competent contractor to have built the entire structures as they exist, and I propose——

The COURT: Do any of those three categories affect this case?

Mr. BROWN: Standing alone, perhaps they do not affect it at all, Your Honor, but I propose to show that these defendants actually spent a reasonable amount of money in constructing them, even though they were not perhaps as competent contractors as they should have been. We are going to produce evidence of actual cost incurred by these defendants. I suppose that if they merely went out and squandered their money, that would be one thing; if, on the other hand, they were faced with a situation where the cost went up, and during that period it would have cost any contractor more

money to build them. I suppose it is relevant evidence in an equity action of this type.

The COURT: Isn't this the price that we are operating under? They proposed to build a house for a certain figure, and they went to the Board to get priority and went ahead on that basis, and there was a ceiling set of some Eighty-three or five hundred dollars. The understanding was that they would build them for that. Wasn't that the condition upon which the priorities were issued?

Mr. BROWN: That was the condition under which the priority rating was granted.

39 The COURT: Yes, and the materials furnished.

Mr. BROWN: No, Your Honor, I don't think there was any evidence in this case that the material was furnished anyone on a contractual basis of that type.

The COURT: No, but the priorities were issued on the understanding that the house on which the materials and priority were granted would be sold for Eighty-three or Eighty-Four Hundred dollars, isn't that it?

Mr. BROWN: I believe, Your Honor, that the witness Baker testified that if costs increased during the period of construction——

The COURT: ——they could go back and get relief.

Mr. BROWN: Or if additions were built into the building that increases would have been probably granted had they applied for them.

The COURT: Which they did not do. That is the difficulty.

Mr. BROWN: I don't concede, Your Honor, that the fact that these individuals failed to take a technical step which would have resulted in increased price should cause this Court to close its eyes to the facts as to the cost and value of the houses which are involved here.

The COURT: Well, while it is in a measure an equity proceeding,—that is, equitable relief is asked for in the form of restitution, it is still a statute that the Government invoked, isn't it a matter of law in that respect.

Mr. BROWN: The plaintiff looks to a statute to find a cause for complaint, but the plaintiff is in this court seeking equitable relief and equitable relief only; consequently, it seems to us that we have the equitable rights of a party in equity in this action. It seems to us that one of the equities in this situation is the amount of money that we put into these houses and the amount of money that those houses now represent.

The COURT: What do you say to that, Mr. Branch?

Mr. BRANCH: I submit that we are in here on an action that is sound in equity, but also under a statute, and the main crux of our complaint is that there was a maximum price set here as a

40 part of a contract between the Government and the priority applicant, and that there was a violation of that contract

when the houses were sold by the builder for greater than the maximum price, without his having had or tried to have had an increase in that maximum price, and with his failure to obtain or even having tried to obtain an increase in that maximum price, that makes irrelevant at this time any testimony as to the value of the houses at the present time.

The COURT: You feel he is firmly bound by the conditions under which a priority was issued?

Mr. BRANCH: I do, indeed, Your Honor.

The COURT: You mean the statute is not flexible enough that a man can get relief, even though he doesn't seek it himself, but comes in later when complaint is alleged against him, and proceeds in equity. You mean he takes no steps to get a modification of the order——

Mr. BRANCH: That is right.

The COURT: Do you see any elasticity in this statute that would give you that right, Mr. Brown? But there it is, and there is firm language there, how can you get relief out of it? You either violate it or you don't.

Mr. BROWN: If the Court please, the regulation, the violation of which we are charged here, provides only for criminal penalties for legal violation.

The COURT: Is it a penalty? Do you claim it is a penal statute?

Mr. BROWN: The only remedy given under this regulation is a criminal action. Now if we were here on a criminal prosecution, we would be able to show this situation in justification, and I say at least in equity we have as much right to show justification as you would in a criminal action at law. Now there is nothing in this regulation that gives the Government the right to come in here seeking to compel restitution. It is because of that fact that they have to come in on an equitable complaint.

The COURT: Isn't that the only way they can proceed? There is no penalty attached to it. Restitution isn't a penalty.

Mr. BROWN: That is correct, Your Honor. What I am pointing out is that the only function the statute performs in this case is to give them some peg to hang a complaint on, but so far as their remedies are concerned, they stand before this Court in no better position than the defendants do before the Court in equity, and your function, I believe, Your Honor, is to administer equity between the parties defendant and the real parties plaintiff: Capt. Tasker and Major Buckey. The Government stands in the middle, using its offices to attempt what they say is an equitable solution here.

The COURT: Well, is it wholly that simple? Isn't this the situation? The evidence isn't all in yet, but as I view it, what actually

41

happened was, these contractors went to the priorities board, received priorities to purchase certain materials, and they used those materials to build a certain house, for which a fixed maximum price was placed thereon. At some stage of the proceedings, they have either enlarged this house, they have made additions to it beyond the specifications, beyond the ceiling, or which would take them beyond the ceiling?

Mr. BROWN: That is correct.

The COURT: Or through some manner, either through incompetency or mismanagement, they have gone to an excess, over $8300. That must have appeared to them somewhere along the road, that they were getting beyond their depth here, as far as expense was concerned.

Mr. BROWN: I believe the facts will so indicate.

The COURT: Then they had a right, or they were entitled then to go back to this Priorities board and get that ceiling raised.

Mr. BROWN: Provided, of course, that the controls were still on.

The COURT: We are assuming that.

Mr. BROWN: Yes, that is so.

The COURT: Of course, if the statute has no application, that is the end of the case. But if they go along and do nothing
42 except get in deeper,—if that is what you claim they did,—and having through their own misconduct, or through their own incompetence got themselves into this situation, they ask now to be rescued from it.

Mr. BROWN: No, Your Honor. We merely ask that this Court in the name of equity not try to drive us deeper in the hole. We are down forty-five or $5,000 more than we would like to be, and the Government wants to put us down $8,000 more. We have taken our licking and learned a lesson, so far as construction is concerned. Now the Government comes here asking for a mandatory injunction, which issues from this court only in equity proceedings, compelling what they call restitution, equity, to stick the burden greater onto these parties.

The COURT: But the troublesome problem here, Mr. Brown, is whether or not the statute gives this court any authority to minimize the claim for which the parties or purchasers seek under this statute. Where does the statute give me any authority or any loophole here to say that while they have got in over their depth and gone beyond their maximum, they have done it because of certain conditions, some of which they had no control over, and some of which probably they had full control of? Now how can they be granted any relief under the plain application of the language of the statute?

Mr. BROWN: Brother Green suggests to me, Your Honor, that this statute on which the Government relies, gives to the administrators of the acts the power to go to this Court to seek several differ-

ent remedies, included among which are the equitable remedies—including injunctive relief. Now if this Court has no discretion on these matters, I suggest that the action be on the law side——

The COURT: To what particular section do you refer?

Mr. BROWN: The Housing Act. It is Section 6. No, I mean 206. Section 7 (a), Your Honor, I believe, is the section under which this Court has or had the power to act when this Act was in effect.

The Expediter may make application to the appropriate
43 court for an order enjoining such acts or practice or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted, and if granted, shall be granted without bond. Now the Porter and Warner Holding Company case is the case which gives rise to these actions by the Government, saying that a mandatory injunction compelling restitution is another order,—another order which is permitted under that case.

The COURT: Generally used in rent control cases, and the situation there, by analogy, could be where a tenant sought restitution of an overcharge and the landlord proposed as a defense some unusual expense, and while the nature of the remedy may be equitable, it is not an equitable defense, it cannot be. The only issue is whether or not the overcharge was made, and paid, and received, and what circumstances might have induced the landlord to accept the rent is not a matter to be tried.

Mr. BROWN: Well, I can't agree that that is the law, Your Honor.

The COURT: I have always understood it to be. Maybe I am wrong.

Mr. BROWN: Under the price control act, if Your Honor please,—under the rent control act and under Regulation 5 with respect to new housing, there was a restitution penalty specifically provided. The amount of the overcharge was treble or double. Now that is not the type of situation you have before you now, Your Honor, in this particular case. This case is governed by Regulation 33, which provides no civil penalty whatsoever for a violation of the maximum price part of the regulation. Regulation 5, which was issued in August of 1946 does follow the form of the price control and rent control acts. It is the same type of regulation which probably takes the discretion from the Court, and the acts under which that
44 regulation and the other rent regulations were issued specifically provides that penalty. Now in this particular situation you have no statutory authority for restitution at all. You have no regulation which provides for restitution at all. You have merely a law which is general, a regulation which makes prohibition and provides criminal penalty only, and the Government comes

in now without any basis for the relief they ask resting on statute or regulation. They are here in equity, Your Honor.

The COURT: Mr. Branch, why do you sue for injunctive relief rather than for straight judgment or money damages?

Mr. BRANCH: Well, I am somewhat uncertain myself, Your Honor. I think probably the reason being possibly one of bookkeeping,—that the beneficiaries of the action are the buyers of the houses, and the Government seeks restitution for violation of the contract with them for the benefit of the purchasers who are the beneficiaries of the statute, in the first place.

The COURT: Is there some specific proviso that allows for such pleading?

Mr. BRANCH: It has been done quite a while.

The COURT: I mean you have got authority for it?

Mr. BRANCH: Yes, I have.

The COURT: In other matters that have gone up to the Appellate Court they have proceeded the same way?

Mr. BRANCH: Yes, Your Honor.

The COURT: No one has raised any objections to the pleadings?

Mr. BRANCH: Well, none that appeared in the Appellate compilation.

The COURT: So that we will have a good record here and have your rights protected, I am disposed to hold strictly to the language of the statute, and to protect your rights, you can make an offer of proof on what you say you could prove, or wished to prove, and I will rule thereon, and you can protect yourself. I think that is the best way to handle this situation.

45 Mr. BROWN: If Your Honor please: We propose to prove through the witness who is now on the stand and who has prepared himself to testify by making an examination of the premises and making a detailed study of the plans, specifications and blue prints,—we propose to prove through him that in his opinion it would have cost a reasonably competent contractor building these homes in Derry at the time they were built, building the Tasker House or the Buckey house up to the minimum requirements of the specifications themselves, would have reasonably cost——

Mr. BRANCH: I don't know why Mr. Brown should be able to testify to something here that the witness is going to say on the stand.

The COURT: He isn't testifying, he is making an offer of proof.

Mr. BRANCH: As to the cost of the house? All right.

Mr. BROWN: The reasonable cost to a reasonably competent contractor at that time for either house, building the house according to the plans, not including the breezeway or garage, would have been approximately $12,350; that for a reasonably competent contractor to have built the breezeway and added the garage to either of

those houses, the expectable cost would have been $13,690; further, that to have built the Tasker house as it was in fact built, with the addition of quality which has been built into that house, that the expectable cost on the Tasker house would be roughly $15,600. I am sorry, I beg your pardon, Your Honor. That to build the Buckey house with the extra work and materials which are in the house, consisting of the dormer, the second floor, the bulkhead to the basement and stairs for that, that the price of the Buckey house to a reasonably competent contractor would have been about $15,600; that the cost to a reasonably competent contractor of the Tasker house, with the additions to it, with the Breezeway, the ceramic tile bath room, stairs to the second floor, and the extra quality materials and workmanship, that the expectable cost there would have been $15,250. Further, Your Honor will realize that the witness would testify, or we would have offered a witness' testimony of the details to support the conclusions I have just stated in the offer.

46

The COURT: Is that your whole statement, Mr. Brown?

Mr. BROWN: Yes.

The COURT: The offer is rejected.

Mr. BROWN: And may our exception be noted?

* * * * * * * *

Q. Mr. Swanburg, did you at my request investigate any trade publications?

A. Yes.

Q. To determine whether construction costs have increased or decreased during the period from August, 1946 to the first of the year 1948?

A. Yes.

* * * * * * * *

Q. How much was it, Mr. Swanburg?

A. This graph uses 1913 as a base index of a hundred (100), so if we go over to 1946—and this is not entirely accurate,—I mean my plot may be a little bit wrong, you know,—on a graph statement, but we land on a point beginning at '46 of 315. Then by using coordinance again, perhaps the tenth month of '47, we land on 400, indicating an increase in there of 85 points.

Q. And in percentage on the base of 315, approximately how great an increase does that indicate?

A. Well, you would have 25% immediately.

Mr. BROWN: You may inquire.

Cross-examination.

Questions by Mr. BRANCH:

* * * * * * *

X Q. Did you during that period in 1946 construct any private dwellings?

A. Not whole dwellings, sir, no.

X Q. Partial?

A. Partial.

X Q. Did you have to get, or did you get any priority ratings for them?

A. Yes, I believe we did.

.47 X Q. Why?

A. Because it worked out this way: I could not secure lumber from a lumber dealer unless I had a slip of paper from him to present back to his wholesaler, to the broker, to the lumber mill, right down the line, in order to cover the law.

X Q. In other words, it was virtually impossible for you to obtain materials during that period without having been assigned a priority rating number?

A. No, that is not so.

X Q. Or obtaining a priority rating?

A. That is not so.

X Q. What do you mean by what you say?

A This is three years ago. There were limits set up on private construction; for instance, repairs were allowed so much money and no more. I could, however, buy stock—not all stock—but I could buy some stock without a priority. The only thing this priority did was to give the lumberman a chance to get his lumber replaced, but the only way at the time, without a piece of paper he couldn't get the stock again.

X Q. Then the general practice among the lumber men was to obtain from the buyers some kind of priority rating?

A. It was mandatory, if you paid for what the statute called for. I don't make myself clear.

* * * * * * *

X Q. Now according to your testimony, the index of costs rose between 1946 and 1947 substantially, is that right?

A. Correct.

X Q. In other words, if a person started a construction job in 1946 and the longer it took him to complete it, the more it would cost him, is that right? during that period?

A. Naturally.

The COURT: Why naturally? You mean the longer it took him to complete it, the more expensive it was?

The WITNESS: Certainly, sir.

The COURT: You mean because the price was rising all the time, is that what you mean?

48 The WITNESS: The prices were rising all the time, Your Honor.

XQ. Mr. Swanburg, do you ever do construction jobs on contract?

A. We do now.

XQ. Did you in '46?

A. No, sir.

XQ. Why not?

A. It was too dangerous.

Mr. BRANCH: All right, that is all.

* * * * * * *

Testimony of LIONEL J. DEGRACE. Sworn.

Direct examination:

* * * * * * *

Mr. BROWN: We offer to prove through this witness, if the Court please, that from the Modern Building Company account at the Derry Bank the total amount of $13,927.89 was expended toward the construction of these two houses; that from a second account standing in the name of Crystal Motors, a total of $9,204.47 were paid on behalf of Modern Building Company toward the construction of these houses, making a total by check disbursements from those two accounts to the date of Mr. DeGrace's report of $23,132.36; further, that the investigation revealed a total of at least $1,595.20 in outstanding, unpaid bills incurred in the construction of the buildings. The report further shows cash disbursements by the defendant Fortier in a total amount of $2,017.77, and taking into account the value of the land, which the testimony would be was taken into the venture and considered in this report to have a value of $1,000,— from this witness we offer to prove that the total expenditures were not less than $27,755.33 to the date of the witness' report.

The COURT: The offer is rejected upon the ground that it does not appear to be relevant, and it is immaterial.

Mr. BROWN: And may our exception be noted?

* * * * * * *

Mr. BROWN: If the Court please, at this time I would like to offer a certified copy of the decree of the Superior Court of the State of New Hampshire, Rockingham County, in an action No. Equity 6838, entitled *Anthony Marino, et al.*, v. *Robert J. Fortier*, and decree dated February 9, 1949, and entered by John R.
49 Goodnow, Presiding Justice, and I offer the record in that action, Your Honor, for the limited purpose of establishing that "the total monies expended and expenses incurred by the petitioners and the defendant in the construction and sale of the two houses is found to be not less than $28,301.79, including the $1,000 value of the land, but excluding all claims of the parties for further compensation for personal services or wages in connection with the construction and sale of the two houses", and if I may add a word of explanation as to why I make this additional offer,—After Mr. DeGrace's report was concluded, there appeared to be further unpaid bills which were taken into account before this decree was entered, thus changing the total amount.

The COURT: You make it in a form of an offer?

Mr. BROWN: Yes.

The COURT: Your offer is rejected.

Mr. BROWN: And may our exception be noted?

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Testimony of GEORGE H. BUTTERFIELD. Sworn.

Direct examination:

* * * * * * * *

Mr. BROWN: If the Court please, we offer to prove through this witness that in performing his duties as an appraiser for the Veterans' Administration in conjunction with GI loans, so called, applied for by Capt. Tasker and Major Buckey, that this gentleman appraised the Tasker house for $11,100, as being its fair value for loan purposes, and that he similarly appraised the Buckey house at that time as having a fair value for loan purposes of $12,500.

The COURT: The offer is rejected.

Mr. BROWN: And may our exception be noted?

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Testimony of JAMES ROYAL KILLKELLEY. Sworn.

Direct examination.

Questions by Mr. BROWN:

Q. Would you state your full name, address and occupation, sir?

A. James Royal Killkelley, Wilton, New Hampshire, Loan Department Manager of the Manchester Federal Savings and Loan Association.

Q. Mr. Killkelley, you were at one time an officer or official in the Federal Housing Administration Office in Manchester?

A. That's right.

Q. And what was your position in that Agency in August of 1946, do you recall?

A. August of 1946 I was either Chief Underwriter or Assistant District Director. About the exact time, I am not sure which title it was.

. . . . . .

Q. Along that same line, Mr. Killkelley, there were some items that under this regulation in '46 were expressly allocated, isn't that so? Structural steel items and such sort of things?

A. You are getting too technical for my memory. As a matter of fact, we had nothing to do with the allocation part of it.

Q. There is a distinction, is there not, between assigning a contractor an HH rating and allocating any material?

A. That's right.

Q. I mean those are two different things, isn't that so?

A. That's right.

Q. And there were allocations being made by some of the Federal Agencies as well as priorities being given at that time?

A. You are getting a little over my head in this allocation matter, because as I understood it—perhaps somebody here knows more about this than I do. The allocation of material was at the level of the manufacturer; that is, before the wholesaler. We were handling priorities for the consumer. I mean, we were giving him these priorities when he wanted to go out and get something. Now this whole system is something somebody else has to explain, because in our particular outfit, all we did was process the applications from the individuals, because our offices are spread over some sixty-five areas, where there are none of them now, and we were nearer to the local builders, that's all.

51 Testimony of VINCENT MARINO. Sworn.

Direct examination.

Questions by Mr. GREEN:

Q. How old are you, Mr. Marino?

A. Twenty-seven.

Q. And what is your occupation?

A. Carpenter.

Q. How long have you been a carpenter?

A. Well, I was a journeyman carpenter at nineteen years old. At that time I had completed two years in college at construction. That is, I completed my course there in Wentworth. I was in charge of maintenance in Maintenance Air Craft School in Boston, with the exception of about four or five months when I enlisted in the United States Naval Seabees. I was with the Seabees for approximately three and a half years at construction work at over seas bases.

Q. And when did you get back?

A. In January of '46, I believe, and it was always my ambition, and also my dad's, to being a carpenter; also, that we go into business ourselves. And as it happened, we started to build these two houses here in Derry, being our first attempt at building homes on our own.

Q. And who did the building there?

A. My dad and myself.

Q. And was Mr. Fortier associated with you?

A. Yes, he handled most of the book work.

Q. Did you do any of the book work yourself?

A. Yes, about three months after we started to build these houses, approximately, I was engaged to wed, and I did get married, and I had been taking care of the books for about that amount of time, until I got married, when I handed them over to Mr. Fortier before I got married and went on my honeymoon.

Q. When you got back from your honeymoon, did you go back to work on these houses?

A. Yes, I did.

Q. And who took care of the books?

A. Mr. Fortier.

Q. And do you have any familiarity with any of the finances after you came back from your honeymoon?

A. No, I didn't.

Q. Were these the first houses you built?

52 A. On our own, yes. I, however, had worked with other contractors in putting up houses prior to those.

Q. For how long did you work on these houses?

A. Well, we worked on these houses—I don't remember the exact amount of time that we were on them, but I do remember the fact that I worked for quite a period of time without being able to get any salary; in fact, I just kept putting more money into them in order to continue the work and to try to get them completed, until there was a period in there where I just couldn't keep on going, I had just been married, and I had to try to support a home, so both I and my dad left the work to get work elsewhere in order to make a week's living.

Q. And under whose control were the houses left when you two left?

A. Mr. Fortier.

Q. That is, he was to take care of them after that?

A. That's right.

Q. Now while you were working—well, do you know approximately when that was that you left?

A. I don't remember.

Q. Well, how long would you say you worked at it?

A. A year and a half.

Q. Now did you apply for any priorities for these houses?

A. Well, we did receive one, but it was very, very seldom that I was asked for a priority number at any place that I went to buy materials.

Q. You mean you could go and buy materials without the use of the number?

A. Yes, very often, sir, places where we would go to buy materials didn't even ask us for a number.

Q. Well, referring back to the time when you applied for the number, did you go to the F.H.A. office?

A. I believe Mr. Fortier and I were there together, yes.

Q. And did you have some discussions with the men in the office?

A. Yes, we did.

Q. And did you get this priority rating?

A. Well, that was automatic, with the filing of the specifications, that was handed to us. I mean it wasn't a separate application that we had to go after.

53 Q. And on the authorization that you received in regard to these houses, when you finally received it, was it your understanding that there was or was not a garage connected with the house?

A. That there was not a garage.

Mr. BRANCH: I object.

The COURT: His knowledge, not his understanding.

Q. Well, what was your knowledge as to whether or not there was to be a garage attached to the house?

A. There was not to be a garage when we started.

Q. Now while you were working on these houses, did any inspectors from the FHA or any other Government Agency come by?

A. Yes, quite frequently. I would say at least every other week or every third week.

Q. Do you recall who they were?

A. Mr. Baker was down several times and I believe Mr. Chesley was there, also; Mr. Jones was, also, a frequent caller. That was from the Federal Savings Bank.

Q. And did they inspect the work you were doing?

A. Yes, at all times, they even commended us as to the fine job we were doing.

Q. Did any of them ever complain about the work you were doing?

A. No, sir.

Q. Did they ever complain as to what you were building?

A. No, sir.

Q. Did any of them ever tell you about any of these regulations?

A. None of them mentioned any——

Mr. BRANCH: I object to this.

The COURT: Were they bound to, Mr. Green?

Mr. GREEN: Well, perhaps not. You may inquire.

Cross-examination.

Questions by Mr. BRANCH:

X-Q. Mr. Marino, when did your construction on these two houses start?

A. I believe it was some time in July.

X-Q. July of '46?

A. Yes.

X-Q. Did you ever use your priority rating number or your priority number to obtain material for these houses?

54 A. Just as I have stated. The only times that I can recall was at Mr. Sundeen's.

X-Q. You did use it then?

A. Well, as I said, some of them would ask us for it and he was one of the parties that did.

X-Q. And others did, too?

A. Well, not that I recall. I say there were occasions where some of them would ask for it. But none other that I recall having asked me for it.

X-Q. Except that you know that there were other cases. In other words, you don't know the names of the particular concerns?

A. No. We knew for a fact that some lumber dealers required the number of this priority assistance, and others didn't.

The COURT: Well, did some of them?

The WITNESS: No.

The COURT: You mean to say that you built the houses and the only request that you had for priorities was for four windows?

The WITNESS: Well, some of the different lumber concerns didn't request us for this number, sir.

The COURT: He is asking you, did any.

The WITNESS: Mr. Sundeen.

X-Q. Did anyone else?

A. No, sir.

X-Q. You never used the priority number that you obtained with any other supplier of material?

A. Not that I recall.

X-Q. But you did with Mr. Sundeen?

A. Yes, sir.

X-Q. Referring to Plaintiff's Exhibit No. 4, Mr. Marino, you had nothing to do with the preparation of that?

A. Yes, this on the back is mine, the printing.

X-Q. This is your work here on the back page?

A. Yes.

X-Q. And referring to item No. 29 of this Exhibit, you printed in something concerning a garage, did you?

A. That's right. At the time we were there at the office of the FHA, it wasn't known as to whether or not they would allow us to build a garage. However, Mr. Chesley asked me to fill it in, anyway.

55 Mr. BRANCH: I believe that is all.

The COURT: Anything further?

Mr. GREEN: No, that is all.

Testimony of ROBERT J. FORTIER. Sworn.

Direct examination.

Questions by Mr. BROWN:

Q. Will you state your name, residence and occupation, Mr. Fortier?

A. Robert J. Fortier; Crystal Avenue, Derry, New Hampshire; occupation, salesman.

Q. What are you selling?

A. Automobiles.

Q. Sell anything else besides automobiles, Mr. Fortier?

A. Not at this time.

Q. You are one of the defendants in this action?

A. That's right, sir.

Q. What were you doing in the summer of 1946 for a living?

A. Selling some real estate and used cars.

Q. And why were you selling real estate at that time?

A. To get a living.

Q. What had happened to the automobile business?

A. Well, there wasn't cars enough, really, so that we had any to sell.

Q. Let me ask you, sir, how old are you?

A. Fifty-one.

Q. Are you a veteran of this last war?

A. No, sir. The First War.

Q. The First War?

A. That's right, sir.

Q. And where did you serve during the First War, what unit?

A. 426 Field Signal.

Q. That is an army organization?

A. That's right, sir.

Q. Now at some time in the spring or summer of 1946, did young Vincent Marino and his dad come to see you about building some houses?

A. That's right, sir.

* * * * * * *

Q. As the result of conversations and discussions with the Marinos, did you enter into some kind of a joint venture with them?

A. That's right, sir.

Q. And under what name or designation did that venture go?

A. Under the Modern Building Company.

56 Q. And how long did that Modern Building Company, so called, last?

A. It went until such a time as we disposed of the houses.

Q. Now you came up to Manchester, you and Vincent Marino, did you, when he applied for authority to build the houses?

A. I did, sir.

Q. Who filled out the specifications and the applications that were filed?

A. Mr. Marino.

Q. And when you came up to the office up there, were these papers made out when you came in, or did you make them out there, or what, if you remember?

A. I don't think I can tell, sir.

Q. Well, let me ask—you have been sitting here in court throughout the trial?

A. Yes.

Q. When you left the Federal Housing Authority office in Manchester, after processing your application, what was the situation as you understood it with respect to whether or not a garage was to be built under that approval?

A. I understood, we were told we could not build one.

Q. Now it is a fact, is it not, Mr. Fortier, as the houses were built and as they were completed, gar[illegible] and breezeways were built attached to both houses?

A. That's right, sir.

Q. And the house that we have been calling the Buckey house was finished off with three rooms upstairs?

A. That's right, sir.

Q. And an additional entry, door and staircase to the basement was built on the Buckey house?

A. That's right.

Q. And in the so-called Tasker house, a staircase to the attic was finished?

A. Yes, sir.

Q. And there were some other changes and additions with respect to the houses, were there?

A. Yes, there were, sir.

Q. Now who handled the books of account down there after Vincent Marino was married?

A. I did most of the time.

Q. And who handled the check books after that?

A. I did. I think so, sir.

Q. Let me ask you this, sir: How did you finance the construction of these buildings?

57 A. Partly by a loan from the Manchester Federal Savings Bank and the rest by borrowing here and there, and by a mortgage on a piece of property I had.

Q. What was your prior experience in the contracting game?

A. None, sir.

Q. What has been your experience since?

A. None.

Q. Did you come to the conclusion at some time that too much money was going into the construction of these houses?

A. I knew we were definitely losing money. It was a scramble to be able to even finish.

Q. When to the best of your recollection did you first realize that you were not going to come out of this venture whole?

A. I should think sometime in '47.

Q. Well, do you recall when you got to the point—let me ask you this: On this arrangement with Vincent Marino and Anthony Marino, were they to be paid anything for their labor?

A. They drew their salary right along until such time as I ran out of money.

* * * * * * *

Q. Now you say they received that how long, or until when?

A. Until such time as I run out of money,—there wasn't any money.

Q. Do you recall about when it was that you ran out of money?
A. It seems to me it was around July of '48.
Q. Let me ask you this, sir: did you and Vincent Marino arrange to sell the Tasker house to Vincent Marino at some time?
A. That's right, sir.
Q. Do you remember when that was?
A. I don't know. I think that was in the fall, around December.
Q. Well, it was before Capt. Tasker bought the house?
A. Definitely, definitely; that was to reimburse us, so as to get some money to go on.
Q. Well, Capt. Tasker bought his house in July or August of '47?
A. Yes, sir.
Q. So that it was before that?
A. That's right, sir.
Q. And why do you say there was this interim sale to Vincent Marino?
A. So that we could try and finish that second house.
58 Q. Trying to get some money to finish it?
A. That's right.
Q. Now then, the money that you got from that sale went into the completion of the other house?
A. That's right.
Q. Now were you able to complete the second house with the proceeds of your original loan and what you got on that sale?

Mr. BRANCH: I object.
The WITNESS: No, sir.
The COURT: It doesn't make any difference, does it?
Mr. BRANCH: I don't see as it makes any difference.
The COURT: It doesn't make any difference, does it, Mr. Brown?
Mr. BROWN: Under Your Honor's previous rulings, I assume the offer is to be excluded; I would like to have the record appear that that is so.
The COURT: If you would like to make an offer, you can.
Mr. BROWN: I would like to offer through this witness that the proceeds of the original construction loan plus the proceeds of an intermediate sale of the Tasker house to the defendant, Vincent Marino,—that the proceeds from those two sources were insufficient, and that the defendant Fortier in fact did raise additional money to permit the completion of the two houses through mortgaging other property which he owned and through the sale of automobile chattels which he owned.
The COURT: The offer is rejected.
Mr. BROWN: And our exception is noted, if the Court please?

Mr. BROWN: I would like to offer to show through this witness, Your Honor, that he suffered a financial loss of some eleven or $1200, in addition to the time, labor and effort that he put into the construction of the two houses, and that similar losses were sustained by the other two defendants.

The COURT: Well, the offer is rejected.

Mr. BROWN: And our exception is noted, please?

Mr. GREENE: And the same for us.

The COURT: Yes.

59 Q. Mr. Green has reminded me of this one other thing. There was a period, was there not, Mr. Fortier, during which the two Marinos worked and there was no money to pay them, and they have not been paid for that labor?

A. That's true, sir.

Cross-examination:

* * * * * * *

X Q. Your activity in the Modern Building Company was by and large the bookkeeping and the book work end, is that right?

A. No, I worked along and done what I could, put in my time.

X Q. Well, what else did you do?

A. Chasing material.

X Q. Oh, you did?

A. Yes.

X Q. In other words, you helped to obtain the materials which were to go into those two houses?

A. Yes, sir.

X Q. Did you ever use your priority rating number to obtain it?

A. Never that I know of, sir.

X Q. Your best recollection is that you never used the priority rating number attached or included on the Outline Specification and, on the application for priority assistance to assist in obtaining material?

A. That is the best of my recollection, sir.

* * * * * * *

The COURT: Evidence Closed.

Mr. BROWN: At this time may we renew our motion to dismiss, and likewise renew our motion to abate, which has been previously made? We make this same motion at this time, and for the reasons that we have previously discussed.

The COURT: Your motions a- denied in both instances.

Mr. BROWN: May our exception be noted?

The COURT: Yes. The record will disclose that you have made them, with a notation by me,—the record is clear,—that the motions were made ~~both at the~~ close of the Plaintiff's case and at the close of all the evidence.

60 In United States District Court

LIST OF EXHIBITS

Plaintiff's Nos.:

1. 3 Ledger Sheets, Modern Building Company, Vincent D. Marino or Robert J. Fortier—Derry, N. H.

2. Signature card, Modern Building Company, First National Bank, Derry—N. H. Vincent D. Marino—Robert J. Fortier.

3. Application for priority assistance dated August 21, 1946, signed by Vincent D. Marino.

4. Outline Specifications dated August 21, 1946, signed Modern Building Co., R. J. Fortier.

5. Blue prints of plans of Houses in question.

6. Report of Architectural Examiner, W. H. Baker.

7. Priorities Processing Report, signed by Charles H. Chesley, dated Sept. 9, 1946.

8. Sales slip, Sundeen Lumber Co. to Modern Building Co. dated 12/10/46, Amount $18.00.

Defendants':

A. Folder containing checks and statements for identification.

B. Statements and checks of Crystal Motor account, for identification.

C. Statement signed by Deane C. Tasker, Dated 29 June, 1948, Produced by Plaintiff, for identification.

In United States District Court

MOTION OF DEFENDANTS VINCENT D. MARINO AND ANTONIO MARINO TO ABATE, AND ORDER OF COURT THEREON

(Filed and Denied September 28, 1949)

Now come the defendants Vincent D. Marino and Antonio Marino and by their counsel move the Court that the above entitled action be abated, for the following reason:

1. For lack of a proper party or parties plaintiff. The party plaintiff of record has no interest in the proceedings; and the

61 real parties in interest are not parties of record. No authority lies in the Attorney General's office to conduct, initiate, or maintain this action.

Dated September 28, 1949.

MEYER GREEN,
Attorney for VINCENT D. MARINO and
ANTONIO MARINO,
Defendants.

September 28, 1949.
Motion denied.
Defendant excepts.

ALOYSIUS J. CONNOR,
U. S. District Judge.

In United States District Court

MOTION OF DEFENDANT ROBERT FORTIER TO ABATE, AND ORDER OF COURT THEREON—Filed and Denied September 28, 1949

Now comes the defendant Robert Fortier and by his counsel moves the Court that the above entitled action be abated, for the following reason:

1. For lack of a proper party or parties plaintiff. The party plaintiff of record has no interest in the proceedings, and the real parties in interest are not parties of record. No authority lies in the Attorney General's office to conduct, initiate, or maintain this action.

Dated September 28, 1949.

STANLEY M. BROWN,
Attorney for ROBERT J. FORTIER,
Defendant.

September 28, 1949.
Motion denied.
Defendant excepts.

ALOYSIUS J. CONNOR,
U. S. District Judge.

62

In United States District Court

MOTION OF DEFENDANTS VINCENT D. MARINO AND ANTONIO MARINO TO DISMISS COMPLAINT, AND ORDER OF COURT THEREON—Filed and Denied September 29, 1949

Now come the defendants Vincent D. Marino and Antonio Marino in the above entitled cause, by their attorney, and move the Court that the complaint be dismissed, for the following reasons:

1. Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A. App. Sec. 631 et seq.), referred to in paragraph 2 of the complaint, was expressly repealed by Laws of 80th Congress, Chapter 29, Public Law 29, in Section 3 thereof, said repeal taking effect for all purposes material to this action on, to wit, March 31, 1947.

2. The Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App. Sec. 1821 et seq.), referred to in paragraphs 1, 3 and 4 of the complaint, was expressly repealed in all respects material to this action by Laws of the 80th Congress, Chapter 163, Public Law 129 (Housing and Rent Act of 1947), and sections 4, 5, and 7 were thus repealed as of June 30, 1947. By operation of the repeal of Section 1 of the Veterans' Emergency Housing Act by Section 1 of the Housing and Rent Act of 1947 "all regulations and orders issued thereunder" terminated and were null and void on and after June 30, 1947.

3. As the result of the above-mentioned legislation Regulation 33 was not in effect after June 30, 1947 insofar as it relates to Maximum sales prices, and there was no maximum sales price in effect on November 12, 1947 when the Buckey house was sold as alleged in paragraph 9 of the complaint, nor on December 4, 1947 when the Tasker house was sold as alleged in paragraph 10 of the complaint.

WHEREFORE, the purpose of this action as set forth in paragraph 4 of the complaint being illusory, and the acts complained of not being violative of law or regulations, the defendants Vincent

63 D. Marino and Antonio Marino move that the complaint be dismissed, and for their costs.

Dated September 28, 1949.

MEYER GREEN,
Attorney for Those Two Defendants.

September 29, 1949.
Motion denied.
Defendant excepts.

ALOYSIUS J. CONNOR,
U. S. District Judge.

In United States District Court

MOTION OF DEFENDANT ROBERT FORTIER TO DISMISS COMPLAINT, AND ORDER OF COURT THEREON—Filed and Denied September 29, 1949

Now comes the defendant Robert Fortier in the above entitled cause, by his attorney, and moves the Court that the complaint be dismissed, for the following reasons:

1. Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A. App. Sec. 631 et seq.), referred to in paragraph 2 of the complaint, was expressly repealed by Laws of 80th Congress, Chapter 29, Public Law 29, in Section 3 thereof, said repeal taking effect for all purposes material to this action on, to wit, March 31, 1947.

2. The Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App. Sec. 1821 et seq.), referred to in paragraphs 1, 3, and 4 of the complaint, was expressly repealed in all respects material to this action by Laws of the 80th Congress, Chapter 163, Public Law 129 (Housing and Rent Act of 1947), and sections 4, 5, and 7 were thus repealed as of June 30, 1947. By operation of the repeal of Section 1 of the Veterans' Emergency Housing Act by Section 1 of the Housing and Rent Act of 1947 "all regulations and orders issued thereunder" terminated and were null and void on and after June 30, 1947.

64 3. As the result of the above-mentioned legislation Regulation 33 was not in effect after June 30, 1947 insofar as it relates to Maximum sales prices, and there was no maximum sales price in effect on November 12, 1947 when the Buckey house was sold as alleged in paragraph 9 of the complaint, nor on December 4, 1947 when the Tasker house was sold as alleged in paragraph 10 of the complaint.

WHEREFORE, the purpose of this action as set forth in paragraph 4 of the complaint being illusory, and the acts complained of not being violative of law or regulations, the defendant Fortier moves that the complaint be dismissed, and for his costs.

Dated September 28, 1949.

STANLEY M. BROWN,
Attorney for ROBERT J. FORTIER,
Defendant.

September 29, 1949.
Motion denied.
Defendant excepts.

ALOYSIUS J. CONNOR,
U. S. District Judge.

In United States District Court

DEFENDANTS' DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL—Filed July 1, 1950

Robert Fortier, Vincent D. Marino and Antonio Marino, d/b/a Modern Building Company, appellees, hereby designate the following additional portions of the record, proceedings, and evidence to be contained in the record on appeal from the judgment entered in the above-entitled action:

1. The material portions of the transcript of the evidence introduced in the District Court as marked at pages 4-5, 6, 9-10, 12-15, 33, 41-44, 112, 117, 121-131, 132-133, 137; 138-139, 139-140, 141, 142-143, 147, 155-158, 160-163, 163-166, 167, 169, it being agreed
65 that the appellant shall file an amended Condensed Statement of Testimony and print in addition thereto question and answer testimony as marked at transcript pages 45-52, 99, 133-135, 158-159.

2. Motion of defendants Vincent D. Marino and Antonio Marino to abate complaint.

3. Motion of defendant Robert Fortier to abate complaint.

4. Motion of defendants Vincent D. Marino and Antonio Marino to dismiss the complaint.

5. Motion of defendant Robert Fortier to dismiss the complaint.

6. This designation.

ROBERT FORTIER,
By McLANE, DAVIS, CARLETON & GRAF,
By STANLEY M. BROWN,
Attorneys for Defendant ROBERT FORTIER,
VINCENT D. MARINO and
ANTONIO MARINO,
By GREEN, GREEN and ROMPREY,
By SAMUEL GREEN,
Attorneys for Defendants VINCENT D. MARINO and
ANTONIO MARINO.

(Memorandum: Order of enlargement of time for filing record on appeal to and including July 21, 1950, is here omitted.)

66-68 Clerk's Certificate to foregoing transcript omitted in printing.

69 United States Court of Appeals for the First Circuit, October Term, 1950

No. 4521

UNITED STATES OF AMERICA, PLAINTIFF, APPELLANT

v.

ROBERT FORTIER ET AL., DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[89 F. Supp. 708]

Before MAGRUDER, *Chief Judge*, and WOODBURY and FAHY, *Circuit Judges*

Robert D. Branch, Assistant U. S. Attorney, with whom *John J. Sheehan*, United States Attorney, was on brief, for appellant.

Stanley M. Brown, with whom *Meyer Green, McLane, Davis, Carleton & Graf*, and *Green, Green, Romprey & Sullivan* were on brief, for appellees.

OPINION—December 12, 1950

MAGRUDER, *Chief Judge:*

On November 9, 1948, the United States filed its complaint in the court below under § 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207) against the defendants, doing business in partnership under the name Modern Building Company. Relief was sought by way of mandatory injunction requiring the de-
70 fendants to make restitution to two veterans, who had purchased houses constructed by the defendants, of sums which they had paid for said houses in excess of the maximum sales prices set forth in defendants' approved application for priorities assistance under Priorities Regulation 33 (11 F.R. 4085). The district court gave judgment for the defendants, and the United States appealed.

Priorities Regulation 33 was issued by Civilian Production Administration pursuant to the provisions of Title III of the Second War Powers Act, as amended (56 Stat. 176), and executive orders thereunder.* Subsequently, by Housing Expediter Priorities Order

* So far as Priorities Regulation 33 rested upon the statutory basis of Title III of the Second War Powers Act, that basis was eliminated by the expiration of said Title III on March 31, 1947, by force of Section 3 of the First Decontrol Act of 1947 (61 Stat. 34).

5 (12 F.R. 2111), the Housing Expediter took over and adopted Priorities Regulation 33 as his own regulation under the regulatory power conferred upon him by § 4 of the Veterans' Emergency Housing Act of 1946.

The defendants, on August 21, 1946, made application for a residential construction permit under Priorities Regulation 33. Upon approval of the application on September 9, 1946, defendants were authorized to construct two five-room houses in accordance with detailed specifications. A project serial number was assigned, and an HH preference rating was issued to the defendants; also, a maximum sales price of $8,350 was established for each house. At this time the building materials which were to be purchased with the priorities assistance were all under price control. But by Supplementary Order 193, issued by the Price Administrator November 12, 1946, price controls were lifted from all such commodities (11 F.R. 13464). It does not appear that the defendants had made use of their preference rating to obtain any substantial amount of
71 building materials prior to the lifting of price control. Indeed, the record is lacking any clear indication that the defendants had any substantial benefit from their preference rating in the obtaining of building materials. Apparently such preference ratings which had not been used prior to March 31, 1947, ceased to be of value after that date. See testimony by the Housing Expediter, Hearings before the Committee on Banking and Currency, House of Representatives, 80th Cong., 1st Sess., 1947, on H.R. 2547, at p. 55.

One of the houses, which was completed in August, 1947, was sold on December 4, 1947, for the price of $12,000. The other house was not completed until January, 1948, but it had been sold by the defendants, prior to completion, on November 12, 1947, for $12,800. The defendants offered to prove, through the testimony of an appraiser for the Veterans' Administration, that, in performance of his duties in conjunction with G.I. loans, he had appraised the first house as being of fair value of $11,100 for loan purposes, and the second of the fair value of $12,500 for loan purposes. This offer of proof was rejected by the court.

Section 944.54(g) of Priorities Regulation 33 forbade any person to sell a dwelling house built under said regulation for more than the approved maximum sales price; such restriction, the regulation stated, "must be observed so long as this regulation remains in effect." (Section 1(b) of the Veterans' Emergency Housing Act of 1946 provided that the Act, "and all regulations and orders issued thereunder, shall terminate on December 31, 1947, or upon the date specified in a concurrent resolution by the two Houses of Congress, declaring that the provisions of the Act are no longer necessary to deal with the existing national emergency, whichever date is the

earlier." Section 5 of the Veterans' Emergency Housing Act provided (60 Stat. 210):

72 "It shall be unlawful for any person to effect, either as principal or broker, a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act, or to solicit or attempt, offer, or agree to make any such sale. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act. Notwithstanding any termination of this Act as contemplated in section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

Section 7 of the same Act contained various provisions for criminal and civil enforcement.

As it happened, the Veterans' Emergency Housing Act of 1946 was not terminated in either of the two ways contemplated in § 1(b) of that Act, above quoted. Rather, such Act, or the part thereof here involved, was repealed on June 30, 1947, by the Housing and Rent Act of 1947, § 1(a) of which provided (61 Stat. 193):

"Sections 1, 2(b) through 9, and sections 11 and 12, of Public Law 388, Seventy-ninth Congress, are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment of this Act are hereby returned to the Treasury: *Provided*, That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with re-
73 spect to veterans of World War II, their immediate families, and others, shall remain in full force and effect."

It seems clear that the United States cannot base its present suit upon the last sentence of § 5 of the Veterans' Emergency Housing Act, which was thus repealed outright on June 30, 1947, prior to the sales of the houses now in question. True, the repealing section, § 1(a) of the Housing and Rent Act of 1947, contained a proviso keeping in effect certain priorities theretofore granted for the delivery of housing materials. But the language of the proviso does not aptly express an intention by Congress to keep in effect the

maximum selling price restrictions of Priorities Regulation 33, as applied to *future* sales of houses built under residential construction permits approved prior to June 30, 1947. The legislative history of the proviso is somewhat obscure and inconclusive. Apparently what Congress had in mind is indicated in the report of the House Committee on Banking and Currency on S. 2182 which became the Housing and Rent Act of 1948. This report stated (H. R. Rep. No. 1560, 80th Cong., 2d Sess.):

> "The Housing and Rent Act of 1947 protected any allocation made or committed or priorities granted for building materials to veterans of World War II or their families under Public Law 388, of the Seventy-ninth Congress. This protection was continued in effect in this bill to honor any such commitments which might still exist."

Having repealed the Veterans' Emergency Housing Act of 1946, it is significant that Congress addressed itself specifically to the problem of veterans' housing in the Housing and Rent Act of 1947. Thus in § 4(a)(1) of that Act it was provided that no single family dwelling house, "the construction of which is completed after
74 the date of the enactment of this title and prior to March 1, 1948, shall be sold or offered for sale, prior to the expiration of thirty days after construction is completed, for occupancy by persons other than" veterans of World War II or their families, and in § 4(a)(3) it was provided that no such dwelling house "shall be sold or offered for sale to any person at a price less than the price for which it is offered to veterans or their families". If Congress had further intended to keep in force for the future any maximum selling prices which had theretofore been imposed under Priorities Regulation 33, it would have been natural to express such intent in the proviso to § 1(a) which repealed the Veterans' Emergency Housing Act of 1946, the statutory basis for Priorities Regulation 33.

The United States puts much reliance upon the Act of March 22, 1944 (58 Stat. 118), amending R.S. § 13 to read as follows (as now found in 1 U.S.C. § 109):

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still re-

maining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Since § 1(a) of the Housing and Rent Act of 1947 did not expressly provide that the repeal of the Veterans' Emergency Housing
75 Act of 1946 should have the effect of releasing or extinguishing any "penalty, forfeiture, or liability incurred" under such Act and Priorities Regulation 33 thereunder, we take it that, by virtue of the provision of 1 U.S.C. § 109 above quoted, the Veterans' Emergency Housing Act of 1946 and Priorities Regulation 33 thereunder must be treated as still remaining in force for the purpose of sustaining any proper action for the enforcement of any "penalty, forfeiture, or liability" incurred by the defendants thereunder prior to June 30, 1947, when the Act was repealed. But that is of no help to the United States in the case at bar, for here the sales of the two houses did not take place until after June 30, 1947, and therefore the defendants as of that date had not incurred any "liability" to make any restitution of a portion of the purchase price paid by the purchasers of the two houses. The obligation of the defendants to observe a maximum sales price of $8,350 in the sale of the two houses in question was in no proper sense of a contractual nature, but resulted by imposition of law under § 4 of the Veterans' Emergency Housing Act of 1946 and Priorities Regulation 33 thereunder. That contingent obligation necessarily lapsed with the repeal of the Act and the regulation; indeed, as above stated, § 944.54(g) of Priorities Regulation 33 expressly provided that such maximum price restriction "must be observed so long as this regulation remains in effect." In this respect, price regulation on the sale of houses under the Veterans' Emergency Housing Act of 1946 was no different from price regulation under the Emergency Price Control Act of 1942, as amended. When the latter Act terminated on June 30, 1947, there was of course no further obligation to observe price ceilings in the future sale of commodities, although under § 1(b) of the Price Control Act, "as to offenses committed, or rights or liabilities incurred, prior to such termination date," the provisions of the Act
76 and the regulations thereunder "shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense." (56 Stat. 24.)

United States v. *Carter*, 171 F. 2d 530 (C.A. 5th, 1948), is distinguishable, for there the government was allowed to maintain an action "to secure restitution of overcharges that had been made while the 1946 Act was in full effect". Other cases, in so far as they tend against the conclusion we have reached, are to us unpersuasive in their reasoning. See *United States* v. *Tyler Corp.*, 90 F. Supp. 395

(D.C.E.D.Va. 1949); *Rheinberger* v. *Reiling*, 89 F. Supp. 598 (D.C. D.Minn. 1950); *Pruitt* v. *Litman*, 89 F. Supp. 705 (D.C.E.D.Pa. 1949); *Katz* v. *Litman*, 89 F. Supp. 706 (D.C.E.D.Pa. 1949).

The judgment of the District Court is affirmed.

WOODBURY, *Circuit Judge*, (concurring). I entirely agree All I care to add is that I entertain grave doubt with respect to the standing of the United States under § 7(c) of the Act of 1946, or even of the Expediter, or his successor, to bring suits for restitution, particularly within the year given to buyers by § 7(d) of the Act to do so on their own behalf.

77 In United States Court of Appeals

JUDGMENT—December 12, 1950

This cause came on to be heard on the transcript of record of the District Court of the United States for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S.) ROGER A. STINCHFIELD,
Clerk.

78 Clerk's Certificate to foregoing record omitted in printing.

79 Supreme Court of the United States, October Term, 1950

No. 602

ORDER ALLOWING CERTIORARI—Filed May 7, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 952141 22

No. ~~[illegible]~~ 14

In the Supreme Court of the United States

OCTOBER TERM, ~~1950~~ 51

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FORTIER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OCTOBER TERM, 1950

No. 602

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FORTIER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered in the above-entitled case on December 12, 1950.

OPINIONS BELOW

The opinion of the District Court for the District of New Hampshire (R. 12) is reported at 89 F. Supp. 708. The opinion of the Court of Appeals for the First Circuit (R. 67) is reported at 185 F. 2d 608.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on December 12, 1950

(R. 72). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Section 1 (a) of the Housing and Rent Act of 1947, approved June 30, 1947, in repealing the Veterans' Emergency Housing Act of 1946, made unenforceable maximum sales prices and construction requirements, imposed under the authority of the latter Act prior to its repeal, on houses in construction prior to June 30, 1947, but not sold until December 1947.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U. S. C. App. § 1821 *et seq.*), of Section 1 (a) of the Housing and Rent Act of 1947 (61 Stat. 193, 50 U. S. C. App. (Supp. I) § 1881), of the Act of March 22, 1944 (58 Stat. 118, 1 U. S. C. (Supp. I) § 109) and of Priorities Regulation No. 33 of the Civilian Production Administration (11 F. R. 6598) are set forth in the Appendix, *infra*, pp. 14–22.

STATEMENT

The Veterans Emergency Housing Act of May 22, 1946 (60 Stat. 207, 50 U. S. C. App. § 1821, *et seq.*), authorized the Housing Expediter, among other things, to establish priorities for materials in short supply which were needed in the construction of housing accommodations (Section 4 (a)), and to set maximum sales prices for

houses completed after May 22, 1946 (Section 3 (a)). Section 1 (b) provided that the Act, and regulations and orders issued thereunder, were to terminate on December 31, 1947, or on the date fixed by concurrent resolution of both Houses of Congress, whichever date was the earlier. By Section 5 of the Act it was made unlawful to sell or agree to sell a housing accommodation at a price in excess of that established by the Housing Expediter, or to violate the terms of any order or regulation issued under the Act. Section 5 further provided that:

> Notwithstanding any termination of this Act as contemplated in section 1 (b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

Section 7 contained various provisions for criminal and civil enforcement.

Priorities Regulation No. 33 of the Civilian Production Administration (11 F. R. 6598) prescribed the procedures by which construction authorization and priorities assistance could be obtained under the Veterans Emergency Housing Program. It provided that houses must be built according to the specifications submitted with

the application for construction authorization, and that the maximum sales price, which was to be set at the time the application was approved, must be observed "so long as this regulation remains in effect." It provided further that changes in specifications could be made if approved by the agency which approved the original application and that at any time prior to the passing of title an increase in the sales price could be requested of and approved by the Federal Housing Administration if the builder could show increased construction costs over which he had no control. Regulation No. 33 was adopted as his own regulation by the Housing Expediter on March 31, 1947 (12 F. R. 2111). It was revoked on December 31, 1947. (13 F. R. 6.)

Section 1 (a) of the Housing and Rent Act of 1947 (61 Stat. 193, 50 U. S. C. App. (Supp. I) § 1881), which was approved and became effective on June 30, 1947, repealed Sections 1, 2b through 9, 11 and 12 of the Veterans Emergency Housing Act of 1946, but provided:

> That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.

On August 21, 1946, respondents, doing business under the name Modern Building Company, applied to the Federal Housing Administration for construction authorization and priorities assistance under Priorities Regulation No. 33 for the building of two single family dwelling units at Derry, New Hampshire (R. 19). In accordance with Priorities Regulation No. 33, respondents filed, as part of their application, blueprints and outline specifications of the proposed buildings (R. 19) and agreed, in the event the application was approved, to observe the maximum sales price to be set by the Federal Housing Administration. On September 9, 1946, the Federal Housing Administration approved the application, thereby authorizing construction of the units, and set a ceiling price of $8,350 on each unit (R. 19–20). The project was assigned an HH priorities rating to enable the builders to obtain certain building materials specified in Schedule A to Priorities Regulation No. 33 (R. 20).[1]

In building the houses, respondents used their priorities ratings to obtain at least some of the materials needed for construction (R. 29–36). One of the houses, completed in August 1947, was sold in December 1947, for $12,000 (R. 20). The other, although not completed until January 1948, was sold in November 1947, for $12,800 (R. 20).

[1] There is no question but that the applications were made and priorities received under the authority of the Veterans Emergency Housing Act of 1946.

Neither house was built entirely in accordance with the specifications submitted as part of the application and approved by the Federal Housing Administration. Respondents had not requested or been given permission to depart from the specifications or to sell at a price in excess of the ceiling.

The United States brought suit, pursuant to Sections 7 (a) and (c) of the Veterans Emergency Housing Act, to compel respondents to make restitution, to the purchasers of the two houses, of the overcharges and the value of construction omissions. After trial, the District Court entered judgment for respondents (R. 17), holding that since the sales took place after the repeal of the Veterans Emergency Housing Act by Section 1 (a) of the Housing and Rent Act of 1947, they could not be violations of that Act or of Priorities Regulation No. 33. The Court of Appeals for the First Circuit affirmed (R. 67–72).

REASONS FOR GRANTING THE WRIT

1. The judgment below should be reviewed because the court below has erroneously interpreted the Veterans Emergency Housing Act of 1946 and the Housing and Rent Act of 1947 in an area in which a decision by this Court is needed. The decision of the court below is in conflict with decisions of district courts in three other circuits, *Nesseth* v. *Creedon,* 80 F. Supp. 269 (D. Minn.); *Rheinberger* v. *Reiling,* 89 F. Supp. 598 (D.

Minn.); *Pruitt* v. *Litman,* 89 F. Supp. 705 (E. D. Pa.); *Katz* v. *Litman,* 89 F. Supp. 706 (E. D. Pa.); *United States* v. *Austin* (Civil No. 4368, D. Md., decided January 24, 1951), and is, at least, inconsistent with the rationale of the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Carter,* 171 F. 2d 530, and the result of *Heinicke* v. *Parr,* 168 F. 2d 194, in the Court of Appeals for the Sixth Circuit, involving the same statutes. There are about one hundred and fifty suits by the United States involving claims of some 1700 veterans, as well as an undetermined number of suits by veterans on their own behalf, pending in other courts in which the question decided by the court below is at issue. In addition, the Housing Expediter's Office is processing the claims of about two hundred veterans and expects that numerous other suits will be brought. Resolution of the problem by this Court is therefore most appropriate at this time.

2. In repealing the Veterans Emergency Housing Act of 1946, the Housing and Rent Act of 1947 provided "that any allocations made or committed, or priorities granted * * * under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect." *Infra,* p. 19. The court below held

that proviso did not "aptly express an intention by Congress to keep in effect the maximum selling price restrictions of Priorities Regulation 33, as applied to *future* sales of houses built under residential construction permits approved prior to June 30, 1947" (R. 70). We submit that the court's interpretation was too narrow and that the proviso is much more properly interpreted to preserve to veterans all benefits conferred by the 1946 Act on houses construction of which was started before June 30, 1947, with the aid of construction authorization and priorities assistance. Cf. *Nesseth* v. *Creedon, supra.* Maximum sales prices were an integral part of the priorities program, and are included in the "priorities" which are preserved "in full force and effect." If Congress intended by preserving outstanding priorities to ensure that houses started under the Veterans Emergency Housing program should be completed for veterans, it must also have intended that the houses be sold at prices veterans could afford to pay. Congress was primarily interested in the veteran-purchaser, and it is difficult to believe that it desired to keep alive the builder's rights under the priority but to remove his concomitant obligation to the veterans which had always been considered an indivisible part of the grant of a priority.

Moreover, under the provisions of the Act of March 22, 1944 (58 Stat. 118, 1 U. S. C. (Supp I)

§ 109) (*infra*, pp. 19–20), the repeal of a statute does not have the effect of releasing or extinguishing "any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide." The court below agreed that Section 1 (a) of the 1947 Housing and Rent Act did not accomplish a repeal of any liabilities incurred under the Veterans Emergency Housing Act but held that no "liability" could be incurred until the sales were consummated, which was not until after the Act was repealed. We believe that, again, the court has interpreted "liability" too narrowly and that respondents were under a legally enforceable liability not to make overcharges at the time the repealing Act was passed. The relationship between the Government and respondents was not, we presume, contractual in the technical sense. It was, however, very like that between contracting parties. Cf. *Keele* v. *United States*, 178 F. 2d 766 (C. A. 5); *United States* v. *Tyler Corp.*, 90 F. Supp. 395 (E. D. Va.); *United States* v. *Duke Building Corp.*, 79 F. Supp. 681 (S. D. Fla.). Respondents could not have built any houses nor obtained materials in short supply had not the Government authorized the construction and given priorities assistance. As part of the consideration to the Government, respondents agreed that they would not sell at a price above the maximum price set at the time the application was approved, or

Maximum prices were "set" only in the sense that, as part of his application for priorities assistance and construction authorization, the builder himself, proposed maximum prices for approval along with construction specifications and an agreement to give preference to veterans. It was made clear by the regulations that maintenance of these undertakings, including the approved maximum price, was an integral part of the award of a priority rating and the grant of authority to construct.

Moreover, the maximum price requirement was not an independent or extraneous condition appended to the grant of priorities assistance and construction authorization in order to attain some end unrelated to the purpose for which Congress gave the Expediter his priorities-and-allocations powers. Rather, the price restriction was directly related to each of the three general aims Congress declared, in Section 4 of the 1946 Act, that it sought to reach through use of the priorities-and-allocations powers:—(i) conservation of scarce materials, (ii) the making available of moderately priced houses, and (iii) protection for the returning veteran. Thus, the price requirement was integral to the grant of the priority in substance and not only in form.

When, therefore, in Section 1(a) of the 1947 Act Congress preserved "allocations made" and "priorities granted" under the authority of the 1946 Act, it must have intended to preserve the builder's

obligation to maintain the maximum prices and construction requirements on houses built with the aid of those allocations and priorities. There is no indication that it sought to benefit the builder but to release him from his concomitant obligation to the Government and the veteran. On the contrary, the legislative history on the point, though sparse, contains explicit and authoritative recognition that the builder's obligation was preserved by Section 1(a) of the repealing act.

B. The contemporaneous interpretation of Section 1(a) of the 1947 Act by the Housing Expediter, to which he has since consistently adhered, was that maximum sales prices and construction requirements on houses built with the aid of construction authorization or priorities assistance and sold after June 30, 1947 and before December 31, 1947 (when all maximum sales price restrictions were lifted), could be enforced. His interpretation was made known to Congress on several occasions and was not questioned. That interpretation by the agency to which the administration of the Act was intrusted is entitled to great weight in determining the intent of Congress, and is especially significant in view of the fact that Congress, knowing the Housing Expediter's interpretation, has subsequently amended the Housing and Rent Act several times but has left Section 1(a) undisturbed.

C. Even if the interpretation of the court below were more strongly supported by the language and history of Section 1(a) of the 1947 Act, the conclu-

sion that respondents could escape liability for overcharges would be prohibited under the terms of 1 U. S. C., Section 109—the general savings clause. That section provides that, unless the repealing Act expressly so provides, the repeal of a statute shall not release any "liability" incurred under such statute, and the statute must be treated as remaining in force for the purpose of sustaining a proper action for the "enforcement" of the "liability". Whether or not respondents are technically in a contractual relationship with the Government, they were clearly under a fixed obligation—a "liability"—not to make overcharges, which obligation, but for the repealing Act, would clearly have been enforceable against them. The general savings clause preserves that type of fixed obligation to perform a duty in the future, and authorizes enforcement of the obligation if the obligor fails to perform when the proper time comes.

II

Section 7(a) of the Veterans' Emergency Housing Act of 1946 authorized the Housing Expediter, whenever in his judgment "any person has engaged or is about to engage" in an act in violation of Section 5 thereof, to apply to the appropriate court for an injunction "or other order" to enforce compliance with the Act. It cannot be questioned, since the recent decision of this Court in *United States* v. *Moore*, 340 U. S. 616, applying a substantially identical provision of the Housing and

Rent Act, that the Expediter can sue under Section 7(a) for restitution of overcharges. It similarly cannot be doubted that the United States, as the real party in interest *vis a vis* the Housing Expediter, can sue in the place of its agent. Cf. *United States* v. *Allied Oil Corp.*, 341 U. S. 1, 5.

That Section 7(d) of the 1946 Act allowed buyers to sue for the amount of overcharges within one year cannot affect the right of the Government to protect its interest in enforcing the Act, nor does it preclude a suit for restitution by the United States before the expiration of one year from the date of sale.

ARGUMENT

The sole question raised by our petition is whether Section 1(a) of the Housing and Rent Act of 1947, in repealing the Veterans' Emergency Housing Act of 1946, relieved builders who had received construction authorization and priorities assistance under the 1946 Act from their obligation, voluntarily assumed, to sell houses in construction prior to the 1946 Act's repeal on June 30, 1947, and sold between that date and December 31, 1947 (when all maximum price requirements on sales of houses were lifted), at not more than the maximum prices which had previously been approved.[7] The answer largely depends, of course,

[7] Our argument is phrased, generally, in terms of the enforceability of maximum prices. What is said is, of course, equally applicable to the enforceability of construction requirements. The one must stand, or fall, with the other.

on the purpose of Congress in enacting the later Act. We contend that Congress, in preserving, by Section 1(a) of the 1947 Act, allocations and priorities granted under the authority of the 1946 Act, intended to preserve the maximum prices which were an integral part of the grant of allocations and of priorities assistance, and on which the grant was definitely conditioned. All the standard aids to legislative interpretation support that conclusion. In addition, it is our view that, even apart from Section 1(a) of the 1947 Act, the general savings clause now embodied in 1 U. S. Code 109 preserves in full force and effect the builder's obligation to maintain maximum prices. We submit, therefore, that the judgment below must be reversed.[8]

Respondents contended in both courts below, and may contend here, that the United States was not a proper party plaintiff to this suit. We set forth our answer to that contention in Point II.

I

The Housing and Rent Act of June 30, 1947, Preserved the Effectiveness of Maximum Sales Prices Established Prior to That Date as a Part of the Grant of Building Allocations and Priorities under the Veterans' Emergency Housing Act of 1946

[8] The decision below is in accord with the decision in the companion case of *United States* v. *Duvarney*, 185 F. 2d 612 (C.A. 1), now pending on petition for a writ of certiorari, No. 15, this Term, and with *Sedivy* v. *Superior Home Builders*, 188 F. 2d 729 (C.A. 7) (which relies on the decision of the court below in the instant case); petition for a writ of certiorari pending, No. 207, this Term, and *United States* v. *C. B. S.*

A. *The language and legislative history of Section 1(a) of the 1947 Act.*

If the Veterans' Emergency Housing Act of 1946 had not been repealed and had been allowed to run its full course until December 31, 1947 (as provided in Section 1(b) of the 1946 Act, *supra*, p. 5, *infra*, pp. 50-51), there is no doubt that respondents would have been required, in the two sales involved here, to abide by the maximum sales prices which had been established as a part and condition of the grant to them, in September 1946, of a construction authorization and priorities assistance.[9] Did the repeal, on June 30, 1947, of the Veterans' Emergency Housing Act of 1946 make any difference? Congress, in repealing the 1946 Act by Section 1(a) of the Housing and Rent Act of June 30, 1947, specifically pro-

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Construction Co., 93 F. Supp. 664 (S.D. Fla.) (which relies on the District Court's opinion in the instant case), now pending on appeal to the Court of Appeals for the Fifth Circuit.

Supporting the Government's view are *Nesseth* v. *Creedon*, 80 F. Supp. 269 (D. Minn.); *Rheinberger* v. *Reiling*, 89 F. Supp. 598 (D. Minn.), appeal dismissed on stipulation, 185 F. 2d 406 (C.A. 8); *Pruitt* v. *Litman*, 89 F. Supp. 705 (E.D. Pa.); *Katz* v. *Litman*, 89 F. Supp. 706 (E.D. Pa.); *United States* v. *Austin*, Civil No. 4368, D. Md., decided January 24, 1951. The Government's view is also supported by the rationale of *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5), and at least the result in *Heinicke* v. *Parr*, 168 F. 2d 194 (C.A. 6) and *United States* v. *Tyler Corp.*, 90 F. Supp. 395 (E.D. Va.).

[9] Unless Priorities Regulation No. 33, which provided that the restriction on sales prices "must be observed so long as this regulation remains in effect" (sec. 944.54 (g), *infra*, p. 59), had been withdrawn before the sales were consummated. In fact, the regulation remained in effect at all times until it was revoked on December 31, 1947. See *supra*, p. 7.

vided "that any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect." *Supra*, p. 7; *infra*, p. 56. The court below held that that proviso did not "aptly express an intention by Congress to keep in effect the maximum selling price restrictions of Priorities Regulation 33, as applied to *future* sales of houses built under residential construction permits approved prior to June 30, 1947" (R. 56-57; italics in original). In our view, however, the correct interpretation of Section 1(a) of the 1947 Act is that Congress did intend, in preserving allocations and priorities granted under the Veterans' Emergency Housing Act, to keep alive the maximum prices which were a part of the authorizations to build and of the grant of priorities assistance.

1. It is, at the outset, essential to observe that the maximum prices imposed by the Housing Expediter were imposed under Section 4 (*infra*, pp. 53-54) of the Veterans' Emergency Housing Act of 1946 rather than under Section 3 (*infra*, pp. 52-53). Although Section 3 of the Act authorized the Housing Expediter to establish maximum sales prices for housing accommodations completed after the

effective date of that Act, whenever in his judgment the sales prices of such housing "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act," that authority was never exercised.[10] Instead, maximum prices on houses constructed under the Veterans' Emergency Housing Program were imposed, under the authority of Section 4 of the Act, as a part of, and condition to, the grant of authorization-to-construct and of priorities assistance.

As we have pointed out in the Statement, the Veterans' Housing Program, as carried out under the Veterans' Emergency Housing Act of 1946, was in largest part simply a continuation of the same program as it had been begun and carried on under the general authority of Title III of the Second War Powers Act (the wartime priorities-and-allocations statute). See *supra*, pp. 2-7. The latter Act did not contain the equivalent of Section 3 of the 1946 Act, and use was made of the allocations and priorities powers of Title III to establish ceiling prices. Maximum prices, suggested by the builder, were made a condition and part of the award of allocations and priorities assistance. Prior to the institution of the Veterans' Housing Program under Title III, such

[10] In Priorities Order No. 1 of August 27, 1946 (11 F.R. 9507), the Housing Expediter made a finding that sales prices of housing accommodations had risen and threatened to rise in a manner inconsistent with the purposes of the Act; however, he never followed up that finding by establishing selling prices for housing accommodations generally.

"setting" of maximum prices had formed a part and condition of the grant of certain wartime priorities and allocations under that Title, and the requirement had been upheld as within the statute's allocations and priority authority, "for they [the maximum prices] made it certain that any building, even though not directly connected with the production of munitions, should be cheap; and that pro tanto limited the drain upon the total stock of available materials." See *United States* v. *Elade Realty Corp.*, 157 F. 2d 979, 980-981 (C.A. 2) (affirming 66 F. Supp. 630 (E.D. N.Y.)), certiorari denied, 329 U.S. 810; *K. & J. Markets, Inc.* v. *Bowles*, 57 F. Supp. 294, 296-7 (D.N.J.), affirmed on opinion below, 148 F. 2d 661 (C.A. 3); cf. *United States* v. *Ashley Bread Co.*, 59 F. Supp. 671 (S.D. W .Va.); *United States* v. *Eureka Investment Co.*, 66 F. Supp. 637 (D. Ariz.), *United States* v. *Molnar*, 66 F. Supp. 180 (N.D. Ohio); *Nesseth* v. *Creedon*, 80 F. Supp. 269, 273 (D. Minn.).

When the 1946 Act was adopted, the same practice was followed and the same type of allocations-and-priorities authority was utilized. Section 4(a) (*infra*, p. 53) expressly gave the Housing Expediter power to allocate and establish priorities for the use of scarce materials "upon such conditions, and to such extent as he deems necessary and appropriate in the public interest and to effectuate the purposes of this Act." In addition to this broad standard, comparable to that set forth in Title III

of the Second War Powers Act (*infra*, pp. 56-57), Congress also made specific direction, in Section 4 (b) (*infra*, pp. 53-54), that in promulgating any regulation or order allocating or establishing priorities for the delivery of any scarce materials "the Expediter shall give special consideration" to "satisfying the housing requirements of veterans of World War II and their immediate families, * * * and * * * the general need for housing accommodations for sale or rent at moderate prices."[11]

It should also be noted that the Housing Expediter, and the agencies to which his functions were delegated, did not "set" maximum prices under Section 4; the builder set the price of the unit he proposed to build and sought the approval of the Housing Expediter for that construction. The Housing Expediter's function was then to approve or disapprove the construction of the house to be sold at that price. If the proposed construction was thought to be properly conservative of critical materials and the house was to be sold at a price which was "reasonably related to the pro-

[11] The difference between the kinds of authority to establish selling prices under Sections 3 and 4 is analogous to the difference between the authority of the former War Production Board to establish maximum prices as a part of, and a condition to, the allocation of scarce materials (see *supra*, pp. 19-20), and the power of the former Office of Price Administration to establish selling prices generally. In the first situation, only those people who avail themselves of the allocation or priorities assistance subject themselves to the imposition of maximum prices; in the latter situation, all producers of a given commodity are subject to the ceilings.

posed accommodations" (Sec. 944.54 (c) of Priorities Regulation No. 33, 11 F.R. 6599), the construction was approved. The price was a part and condition of the authorization to build and the grant of priorities assistance.[12]

This is plainly borne out by the terms of Regulation No. 33 which show that the maximum price requirement was an integral part of the grant of the priority. The Regulation opens by a general introduction stating (sec. 944.54 (a)(1), 11 F.R. 6598, *infra*, pp. 58-59) that it "provides priorities assistance to carry out the Veterans' Emergency Housing Program which calls for the construction of moderate and low-cost housing accommodations to meet the needs of returning veterans and members of the Armed Forces." It refers to the de-

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[12] The court below largely ignored the fact that permission to build, as well as priorities assistance, was conditioned on the agreement of the builder to observe the maximum price. Thus, the court stressed (R. 55) the statement of the Housing Expediter to Congress that priorities not used by March 31, 1947, became useless. Even were that statement accurate, it would not follow, as the court seemed to feel, that the builder thereby lost his *quid pro quo;* he still retained the benefit of his construction authorization. Cf. *Keele* v. *United States*, 178 F. 2d 766, 769 (C.A. 5).

In fact, however, priorities did not lose their value so early. On March 31, 1947, Schedule A to Priorities Regulation 33 was amended (12 F.R. 2118) to provide that priorities orders must be placed by April 15, 1947. The amendment specifically provided, however, that the time for placing such orders could be extended on the builder's application before June 1, 1947. The conditions for granting such an extension were only that the builder had been unable to find a supplier who would accept his order and fill it within a reasonable time. The time for placing orders could be extended to June 30, 1947, and priorities assistance was, therefore, legally available until that date.

tailed provisions for construction authorization and priorities assistance (the HH rating), and states that the regulation governs "the circumstances under which applications will be approved, the way in which the priorities assistance given under the regulation may be used, and the conditions which will be imposed on the builder and succeeding owners in selling or renting the accommodations * * *." Even more revealing of the fact that the price requirement was part and parcel of the priority are the terms of the certificate which the priority holder was required to place on his purchase order whenever he made use of his priority to secure materials (sec. 944.54 (d) (1), 11 F.R. 6600):

VETERANS' EMERGENCY HOUSING PROGRAM

Project Serial Number —

Rating: HH

I certify to the Civilian Production Administration that the materials covered by this order will be used only in a housing project being built under the Veterans' Emergency Housing Program at —— —— (give location of project), *and that I will comply with the limitations on sales prices or rents and the preference to veterans provided in Priorities Regulation 33 and my approved application.*

——— ———,

Builder [italics supplied]

Nor was it by mere chance or administrative fiat that priorities assistance and construction authorization were tied so directly to the maintenance of maximum prices. The Housing Expediter was not given blanket authority to direct the flow of critical materials in the construction industry. The mandate of Congress, as contained in Section 4, gave him three general standards for the exercise of his authority, insofar as residential housing was concerned.[13] The first was that scarce materials should be conserved; the second, that housing accommodations at moderate prices be made available; and the third, that the bulk of housing accommodations to be built should be available to veterans. The allocations and priorities program established by the Housing Expediter—and, in particular, the maximum sales price requirement—was responsive to all three parts of the Congressional mandate. In order that critical building materials should be conserved, construction authorization and priorities assistance were conditioned upon the agreement of the builder to build houses according to certain approved plans; unless the builder's specifications were deemed to be properly conservative of critical materials, construction was not to be authorized. In addition, the establishment of a maximum price was, in itself, an agent of conservation, since it necessarily tended to limit the use of materials—just as had

[13] These three general standards can be gathered from sections 4 (a), 4 (b), and 1 (a) of the Act. *Infra*, pp. 50, 53-54.

been the case with the maximum price requirements which formed part of the grant of priorities assistance under Title III of the Second War Powers Act. *Supra*, pp. 19-20. Secondly, construction authorization and priorities assistance was explicitly conditioned upon the promise of the builder to sell at a price which in the judgment of the Housing Expediter was moderate. Thirdly, the Congressional purpose to make housing available to veterans was fulfilled by the requirement that all housing built with the aid of priorities assistance, or after construction authorization, had to be offered for sale exclusively to veterans for a period of 60 days after completion of construction, and, again, by the maximum price requirement which was designed to give a reasonable opportunity to purchase to veterans, most of whom would have only moderate incomes for the period following their war service.

The maximum price requirement thus had a part in carrying out each of the three general purposes which Congress sought to accomplish by its grant of priorities and allocation powers in Section 4. It was not an independent or extraneous condition which was appended to the grant of the priority and the construction authorization in order to attain some beneficial end unrelated to the purposes for which Congress granted the Expediter his allocations and priorities powers. On the contrary, the price requirement functioned directly as

one device for fulfilling the very ends which Congress sought to attain through Section 4.[14]

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[14] At all times during the life of the maximum price requirements, there was available a procedure by which builders could apply, before passage of title, for an increase in the prices they had themselves set in their applications for priorities assistance and construction authorization. Section 944.54 (g) (7) of Priorities Regulation No. 33 (*infra*, pp. 60-61) contained provision for such applications and indicated that relief would be granted if the builder could show that he had incurred or would incur additional or increased costs in the construction over which he had no control, and that these increased or additional costs would make it impractical for him to sell at the price specified in his application for priorities assistance. This procedure was open to respondents (see R. 21-22, 31), but they did not avail themselves of it.

The Housing Expediter continued to impose maximum price restrictions as a condition to new construction authorization and priorities assistance until, after the expiration of the price controls generally, in October 1946, it was no longer feasible, in view of the removal of maximum prices on building materials. Increases in the prices of houses which continued to be governed by a maximum sales price were handled under the procedure described in the preceding paragraph of this footnote. On December 13, 1946, the Housing Expediter relaxed the overall $10,000 limitation on sales prices previously in effect (11 F.R. 14323). See *Nesseth* v. *Creedon*, 80 F. Supp. 269, 275 (D. Minn). This procedure for increasing prices to meet increased costs was continued in effect after the repeal of the Veteran's Emergency Housing Act of 1946, on June 30, 1947. See the *Nesseth* case, *supra, and infra*, p. 33.

On December 24, 1946, by Housing Permit Regulation No. 1 (frequently called the HPR), the Expediter eliminated selling price restrictions on all houses the construction of which was begun after that date, and as to which construction authorization and priorities assistance had not been secured under either Priorities Regulation No. 33 or Priorities Regulation No. 5 (fn. 5, *supra*, p. 6) (11 F.R. 14621). Such new construction under the Housing Permit Regulation was subject to quantitative restrictions on floor area, fixtures, etc.—as the means of conserving materials—but there was no maximum price requirement. Sec. 806.1(h). As stated, the Housing Permit Regulation did not directly apply to housing as to which construction authorization and priorities assistance had been secured under Regulation No. 33 or No. 5. However, the new Regulation did provide that a person

In sum, selling price restrictions were an integral part and condition of the allocations and priorities program and of the "allocations made" and "priorities granted" to respondents. This is shown, as we have pointed out, by (a) the genesis and history of the Veterans' Emergency Housing Program, which first made use of maximum price requirements under the priorities and allocations powers of Title III of the Second War Powers Act, and then continued by using the priorities and allocations powers of Section 4 of the Veterans' Emergency Housing Act of 1946; (b) the terms of Priorities Regulation No. 33, under which respondents received their priority and authorization, and (c) by the direct relationship of the price requirement to each of the three purposes Congress sought to attain through use of the priorities and allocations powers granted by Section 4 of the 1946 Act:—conservation of scarce materials, the making available of moderately priced houses, and protection of the veteran.[15]

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to whom a priority had been granted under either of those regulations, but who had not begun the construction of all the dwellings approved in his application, might elect to return his priority to the F.H.A. and to apply for a permit under the HPR for the construction of the dwellings on which construction had not begun. If a permit under the HPR were granted, the priority would be amended to conform to the new regulation, *i.e.*, the maximum sales price requirement would be deleted. Sec. 806.1(a). In short, the practical effect of the HPR was to permit the elimination of the selling price restriction on all houses begun after December 24, 1946.

[15] No question has been raised in this case concerning the constitutional validity of Section 4 or of the statutory powers

If, then, the selling price restriction was an integral part of the grant of the priority and authorization, when Congress declared in Section 1 (a) of the Housing and Rent Act of 1947 that all "allocations made" and "priorities granted" under the 1946 Act "shall remain in full force and effect", it must have intended to retain the price requirement in full force and effect. Indeed, as the Fifth Circuit has pointed out, it must have intended "to retain in full force and effect all orders, commitments, regulations, and remedies relating to veterans' housing which had accrued prior to the date of the 1947 Act." *United States* v. *Carter*, 171 F. 2d 530, 532 (C.A. 5). We cannot suppose that Congress kept outstanding allocations and priorities in effect to ensure that houses started under the Veterans' Emergency Housing Program be completed for veterans and yet did not intend

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of the agencies acting under that section to establish maximum price requirements as a part and condition of the grant of priorities. Constitutional validity is clear. Cf. *Steuart & Bro.* v. *Bowles*, 322 U.S. 398, 405; *Yakus* v. *United States*, 321 U.S. 414; *Woods* v. *Miller Co.*, 333 U.S. 138; *United States* v. *Elade Realty Corp.*, 157 F. 2d 979, 981 (C.A. 2), certiorari denied, 329 U.S. 810; *Gallagher's Steak House* v. *Bowles*, 142 F. 2d 530 (C.A. 2), certiorari denied, 322 U.S. 764; *Shreveport Engraving Co.* v. *United States*, 143 F. 2d 222 (C.A. 5), certiorari denied, 323 U.S. 749; *St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271, 274, certiorari denied, 335 U.S. 815; *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U.S. 948.

There is likewise no doubt that, as a matter of statutory construction, maximum prices could validly form part of the allocations and priorities granted under Section 4. See the *Elade Realty* and other cases cited *supra*, pp. 19-20, and also the discussion in the text *supra*, pp. 20-27. Cf. *United States* v. *Schroeder*, 164 F. 2d 647 (C.A. 7).

to ensure that those houses be sold at prices veterans could normally afford to pay. Congress was primarily interested in the veteran-purchaser, and it is difficult to believe that it desired to keep alive the builder's rights under the priority and authorization but to remove his concomitant obligation to the Government and the veteran which was an indivisible part of the grant of a priority and of construction authorization. Moreover, by the time the 1947 Act became law—June 30, 1947—priorities were no longer of much value to builders (see footnote 12, *supra*, p. 22), and it is equally hard to believe that Congress would have made a special point of preserving priorities if it had only the builder's interest in mind.

2. The sole reference throwing any light on this question in the legislative history of the Housing and Rent Act of 1947 reinforces our conclusion.[16] On that occasion, the Chairman and another member of the House Committee considering the bill, and the Federal Housing Commissioner, all agreed that maximum prices on houses already in construction would be continued in effect.

In the hearings before the House Committee on

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[16] The legislative history of the 1947 Act includes the following materials: Hearings before the Committee on Banking and Currency, H. of Reps., 80th Cong., 1st Sess., on H.R. 2549 (entitled "Housing and Rent Control"); H. Rept. No. 317, 80th Cong., 1st Sess.; H. Rept. No. 591, 80th Cong., 1st Sess. (conference report); S. Rept. No. 86, 80th Cong., 1st Sess. (report on S. 1017, the Senate rent bill, which did not deal with allocations or priorities, but solely with rent control);

Banking and Currency on H. R. 2549,[16a] the following colloquy took place between Chairman Wolcott, Congressman Monroney, and Mr. Raymond Foley, then National Housing Administrator and formerly Federal Housing Commissioner, who administered Priorities Regulation No. 33 (Hearings, p. 226):[17]

> Mr. MONRONEY. One other question. Mr. Chairman, do you consider that this bill will take the ceilings off HH houses?
>
> The CHAIRMAN. There is a provision in the bill which protects the commitments, already made, up to the effective date of the act. It would not affect any commitments made after that date.
>
> Mr. MONRONEY. *In other words, the ceilings on houses built with HH priorities would be left as it is now,* which gives you the right,

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93 Cong. Rec. 4300-4332, 4391-4406, 4406-4417, 6128-6145, 6346, 7153-7166, 7290-1, 7297-7300. (The Senate Committee did not hold hearings on, or consider, the matter of priorities and allocations.)

[16a] H.R. 2549, introduced by Mr. Wolcott, contained language substantially identical with that of the proviso to Section 1(a) of the Housing and Rent Act of 1947. In H.R. 2549, the proviso read as follows:

> *Provided*, that any allocations made or committed, or priorities *established* for the delivery of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect. (Italics supplied) (See Hearings, *supra*, p. 1).

H.R. 3203, which became the Housing and Rent Act of 1947, was later substituted for H.R. 2549.

[17] The Housing Expediter had already reminded the Committee, in the course of his general presentation, that maximum sales price restrictions were generally in effect for housing granted priorities assistance. See Hearings, p. 40.

Mr. Foley, to adjust those ceilings up for increased costs of construction where the builders make a case that their construction costs have increased; is that right?

Mr. FOLEY. That has been our practice in the past, and as I understand, this refers to contracts entered into. I have assumed that that meant the agreement between the builder and the governmental agency that in return for priority aid certain rent ceilings would be applied, or certain sales ceilings would be applied.

The CHAIRMAN. *I might say for the record now that it is intended to cover any agreement or any commitment made by anyone, which was made under the Patman Act* [the Veterans Emergency Housing Act of 1946].

Mr. FOLEY. That would leave us then in the situation that you mention, Congressman Monroney.

Mr. MONRONEY. Well, you would feel that it would be not good for the Government or the veteran to take ceilings off these HH houses, that were built with this priority aid, and on which an agreement had been made by the builder to sell at a ceiling price, as fixed by the Federal Housing Administration on adjustment; is that right?

Mr. FOLEY. Our position in maintaining that control, when the changes were made in the latter part of last year, was on that basis, that it was an agreement under which certain benefits were supposed to flow both ways and should be maintained. [Italics supplied.]

While it is true that the understanding of Messrs. Wolcott, Monroney and Foley is not decisive of the question of Congressional intent, it is, we submit, rather good evidence of that intent, and should not have been dismissed by the court below as "obscure and inconclusive." (R. 57). The Chairman of the Committee, who was also the sponsor of the bill and a leading proponent of the repeal of the Patman Act, expressly agreed with a ranking member of the minority party on the Committee and with the Federal Housing Commissioner, charged with overseeing the maximum price requirements, that such price commitments continued in effect after repeal of the 1946 Act.

B. *Administrative interpretation and subsequent legislative treatment of Section 1(a)*

On July 3, 1947, effective "simultaneously with the approval by the President of the Housing and Rent Act of 1947," the Housing Expediter amended Priorities Regulation No. 33 to reflect changes in the law necessitated by that Act (12 F.R. 4434).[18] The maximum price provisions were, however, left unchanged. On December 5, 1947, Priorities Regulation No. 33 was again amended to provide that maximum prices would thereafter apply only to first sales and subsequent sales would no longer be

[18] The amendment provided that the veterans' preference requirements of the regulation would no longer apply to houses completed after June 30, 1947. Instead, veterans' preference on such houses would be governed by other regulations issued pursuant to the Housing and Rent Act of 1947 (12 F.R. 4265).

subject to regulation (12 F.R. 8205).[19] Priorities Regulation 33 was finally revoked on December 31, 1947, the date on which all regulations under the authority of the Veterans' Emergency Housing Act of 1946 were to expire by the terms of Section 1(b) of that Act. *Infra*, pp. 50-51. At all times during the period from June 30, 1947 to December 31, 1947, the Housing Expediter interpreted the Housing and Rent Act of 1947 as not affecting the obligation of builders who had secured priorities assistance and construction authorization to maintain maximum prices on housing the construction of which had begun before the effective date of the 1947 Act. And the Federal Housing Administration continued to process applications for increases in these maximum prices. See footnote 14, *supra*, p. 26, and *Nesseth* v. *Creedon*, 80 F. Supp. 269 (D. Minn.).[20]

In reaching its decision, the court below ignored that interpretation of Section 1(a) by the Housing Expediter and the Federal Housing Administration. The failure of the court below to give any weight to that interpretation is in conflict with a long line of decisions by this Court that adminis-

[19] Priorities Regulation No. 33 had previously provided that increases in the maximum prices could be requested by a subsequent owner if that owner had made improvements in the house (Section 944.54(g)).

[20] The building trade generally seems to have accepted the interpretation of the Housing Expediter. Numerous applications for increases in the previously approved maximum prices were submitted to and processed by the Federal Housing Administration in the period July 1 to December 31, 1947.

trative interpretations by an agency charged with the administration and enforcement of an act are entitled to great weight in any attempt to divine congressional intent. *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315; *United States* v. *American Trucking Associations,* 310 U.S. 534, 549; *Billings* v. *Truesdell,* 321 U.S. 542, 552.

The interpretation of the Housing Expediter is of even greater weight in this instance since it was subsequently, on more than one occasion, made known to Congress and was not questioned. *United Labor Committee* v. *Woods,* 175 F. 2d 967 (E.C.A.). Cf. *Helvering* v. *Winmill,* 305 U.S. 79; *United States* v. *Dakota-Montana Oil Co.,* 288 U.S. 459, 466. In the course of the Hearings before the House Committee on Banking and Currency on the 1948 extension of rent controls, the Housing Expediter testified (pp. 23-24):

> Section 1(a) [of the 1947 Act] also contains saving provisions which continued in effect allocations made or priorities granted prior to July 1, 1947, and which preserved funds that had been committed prior to that date under Public Law 388, Seventy-ninth Congress. Under these saving provisions, the Office of the Housing Expediter has been performing the following functions:
>
> (a) *The administration and enforcement of allocations made and priorities issued prior to June 30, 1947.* These include veterans' preference on housing completed with priorities assistance prior to June 30, 1947; *maximum*

sale prices on priority assisted housing; certificates and directives with respect to Government surplus property; and the requirement that critical materials obtained with priorities assistance continue to be used for the purposes for which assistance had been extended. All of these have terminated as of December 31, 1947.

There remain, however, a large number of cases involving violations which occurred on or before December 31, 1947, with respect to veterans' preference and *maximum sales prices,* particularly the construction and sale of housing units which were of shoddy construction far below specifications in connection with which priorities assistance had been extended. Since the savings provisions of section 1(a) provide legislative authority for enforcement proceedings in such cases, I recommend that they be extended. [Italics added.]

The failure of Congress to question the Housing Expediter's interpretation on this occasion is especially significant, since Representative Wolcott, the author of Section 1(a) of the 1947 Act, presided at this session of the Committee. Substantially the same testimony was given by the Housing Expediter before a Subcommittee of the Senate Banking and Currency Committee considering the 1948 extension of Rent Control,[21] and

[21] Hearings before a Subcommittee of the Senate Banking and Currency Committee on Bills pertaining to the Extension of Rent Control, 80th Cong., 2d Sess., p. 536.

again his interpretation of Section 1(a) was not questioned. Indeed, the interpretation of the Housing Expediter seems to have been adopted by Senator Cain, the Chairman of the Senate Committee and author of the 1948 Act, who, in the course of the debate on the 1948 Act, in explaining Section 1(a) of the 1947 Act, stated (94 Cong. Rec. 1457, 80th Cong., 2d Sess.):

> Section 1(a) deals with liquidating functions concerning *enforcement of* veterans' preference and *maximum sales prices of houses,* premium payments for scarce building materials, and market-guaranty agreements for the manufacture of houses. As requested by the Acting Housing Expediter, these functions are not eliminated. They are continued in the Housing Expediter * * *, by omitting mention of them in the bill. [Italics supplied.]

Again, in 1949, in the Hearings before the House Committee on Banking and Currency on the 1949 extension of rent control, the Housing Expediter stated (p. 47):

> I should like to report on our activity in connection with violations of the Veterans' Emergency Housing Act. These violations include *overceiling sales,* shoddy construction, and failure to construct according to plans and specifications. *Although that act itself expired December 31, 1947, specific appropriation was made last year for the continuing investigation of complaints and prosecution of violations.*

> As of January 5, 1949, we have received complaints involving over 200,000 units. In more than 100,000 of these units no action could be taken on the complaint *because the alleged violation had occurred after the expiration of the act.* [Italics supplied.] [22]

In the face of these numerous disclosures of his interpretation by the Housing Expediter, Congress, although it has drastically amended many other sections of the Housing and Rent Act, has left Section 1(a) unchanged to date. In view of the continuous reenactment of the general rent control law, of which Section 1(a) has formed a part, Congress must be regarded as having ratified the interpretation of the Housing Expediter. *Woods* v. *Oak Park Chateau Corp.*, 179 F. 2d 611 (C.A. 7).

C. *The effect of 1 U.S. Code, Section 109—the general savings clause.*

Even though we are wrong as to Section 1(a) of the 1947 Act, and the *proviso* of that section be held not to continue the builder's obligation to sell at the ceiling price, we believe there is an alternative path to reach the same result. Quite apart from

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[22] In February 1949, the President transmitted a revised estimate of appropriation for the fiscal year 1949, involving an increase for the Housing Expediter. In partial justification of the increase, it was stated "that veterans' complaints pertaining to dwelling units purchased by them and which were constructed with priority assistance are continuing to be received in considerable volume making it necesssary to continue this program until at least June 30, 1949." H. Doc. No. 50, 81st Cong., 1st Sess., p. 2.

section 1(a) is the effect of the general savings clause.—Section 109 of Title 1 of the U.S. Code—which governs all repealers. Section 109 provides that the repeal of a statute does not have the effect of releasing or extinguishing "any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." *Infra*, p. 57.

The court below agreed with petitioner that, by virtue of that provision, Section 1(a) of the Housing and Rent Act of 1947 did not accomplish a repeal of any "liabilities" incurred under the Veterans' Emergency Housing Act (R. 58).[23] The court held, however, that no "liability" could be incurred until a sale was consummated and, since the sales involved here did not occur until after the repeal of the 1946 Act, there was no "liability" incurred under that statute which could be preserved (R. 58). We submit that the court has construed "liability" too narrowly, and that respondents, at the time the repealing act was passed, were under a legally enforceable obligation—a "lia-

[23] The general savings clause is applicable notwithstanding the inclusion in the repealing act of a specific savings clause, unless where, perhaps, there is a direct conflict between the two clauses. *Great Northern Ry. Co.* v. *United States*, 208 U.S. 452, 465-466. As the court below held (R. 58), there is plainly no conflict between section 1 (a) of the 1947 Act and 1 U.S.C. 109.

bility"—not to sell above the maximum sales price so long as Priorities Regulation No. 33 remained in effect (*i.e.*, until December 31, 1947). This liability was preserved by 1 U.S.C. 109 from extinguishment on June 30, 1947, and continued in effect until the end of 1947. Upon respondents' violation of their obligation in November and December 1947, a proper action to enforce it could be brought under the pertinent enforcement provisions of the Veterans' Emergency Housing Act of 1946, which Section 109 kept in force and effect for that purpose.

1. Whether or not the relationship between the Government and respondents was contractual in the technical sense, it was certainly very like that between contracting parties. *Keele* v. *United States*, 178 F. 2d 766, 768-9 (C.A. 5); *United States* v. *Tyler Corp.*, 90 F. Supp. 395, 396-397 (E.D. Va.); *United States* v. *Duke Building Corp.*, 79 F. Supp. 681, 683 (S.D. Fla.); cf. *United States* v. *Elade Realty Corp.*, 157 F. 2d 979, 981 (C.A. 2), certiorari denied, 329 U.S. 810. Respondents could not have started construction on any houses in 1946 without authorization by the Housing Expediter, nor would materials in short supply have been available to them without the Housing Expediter's assistance. As a part of, and condition to, granting that authorization and assistance, the Government required that the houses, when constructed, be sold at a price which the average veteran could afford and which would tend to conserve

materials, and that the house, as built, conform to the specifications approved. As part of the "consideration" to the Government, respondents agreed to sell at the maximum price and construct according to specifications. The plans were drawn by the builder and the price set by the builder; if he felt that he could not operate within the limits imposed under the Veterans' Housing Program, he did not have to build. His application is proof of his belief that profitable operation within the program was possible. Upon undertaking to build, he came under an obligation, a liability, to observe the terms of his agreement. Were this an ordinary contract, there would be no question that the Government, having fully performed its part of the agreement, could force respondents to fulfill their obligations. Whether or not the relationship be characterized as contractual, it cannot be denied that respondents were under a liability, an obligation, to perform—an obligation which, but for the repealing Act, would have been enforceable against them.

That respondents could have modified their liability by securing a price increase on a showing of increased costs beyond their control (see pp. 26, 33, *supra*) does not weaken this argument. They did not apply for an increased price and their liability remained unchanged. They did not choose to modify it in the manner authorized by their undertaking. See *United States* v. *Duke Building Corp., supra.*

2. The term "liability" in Section 109 covers this type of fixed statutory-consensual obligation to perform a function or fulfill a duty at some definite future time. In common usage, "liability" certainly includes "obligation", and "obligation" imports future performance. Besides, "liability", as used in Section 109, has consistently had a broad construction, based upon its inherent purpose of maintaining equal treatment for all persons affected by a particular statute. *Hertz* v. *Woodman*, 218 U.S. 205; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 119; *Herman* v. *Woods*, 175 F. 2d 781, 786 (E.C.A.); *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 237 (C.A. 8), certiorari denied, 334 U.S. 845, and cases cited.

It is true that one prime purpose of the general savings clause is to prevent—in the absence of a deliberate legislative directive—the repeal of a statute from acting as a legislative pardon for then-existing actual *violations* of duties imposed by the repealed statute; the statute is continued in effect in order to permit redress of that existing breach of duty. But this is not all that Section 109 does, as the Court of Appeals seemed to think (R. 58). The section, and its predecessors, have not been construed as limited to cases where, at the time of repeal, the person concerned had already breached a duty flowing from the statute being repealed. These savings

acts have been applied to preserve "liabilities" where actual performance of the duty, though fixed by events occurring prior to repeal, was not called for until after the repeal. For instance, in *Hertz* v. *Woodman, supra,* the general savings clause was invoked to support collection of an inheritance tax from a taxpayer whose testator died prior to repeal of the inheritance tax statute, even though it was conceded that the tax was not due and payable until after repeal. And in *Herman* v. *Woods, supra,* the Emergency Court of Appeals read the term "liability", in a savings clause, as covering a landlord's contract with a tenant to make a future refund in the event certain circumstances occurred.

Similarly, prior to repeal of the Veterans' Emergency Housing Act of 1946, respondents came under a fixed obligation, under that Act, to offer for sale and sell the houses they were then building at the approved maximum prices, so long as Priorities Regulation No. 33 remained in effect. The obligation was definite and fixed, even though performance of the duty would necessarily have to occur in the future when the houses were ready to be sold. On repeal of the 1946 Act, Section 109 of Title 1 preserved this duty of future performance, just as, in the *Hertz* case, it preserved the taxpayer's duty to make future payment of the inheritance tax. In the words of Section 109, respondents' "liability" was not "released" or "extinguished"; the 1946

Act "shall be treated as still remaining in force for the purpose of sustaining any proper action * * * for the enforcement of such * * * liability." Certainly, what the United States seeks here is the *"enforcement"* of a *"liability"*.

If Section 109 is not read so as to preserve such statutory obligations calling for future performance, it will fulfill only part of its aim to keep on an equal plane all persons who have come under a definite obligation during the repealed statute's period of effectiveness.[24] In the case of housing built with priorities assistance and construction authorizations, it will mean that builders who sold before June 30, 1947, are held to the maximum price restrictions, while those, like respondents, who made sales after that date, are freed from the requirement—even though both sets of builders made the same undertaking, came under the same obligation, and received the same *quid pro quo*.[25]

In short, the language of the repeal provisions of the Housing and Rent Act of 1947 and all aids to its

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[24] This purpose is reflected in such decisions as *United States* v. *Kirby*, 176 F. 2d 101, 104 (C.A. 2), *Lovely* v. *United States*, 175 F. 2d 312, 316-318 (C.A. 4), certiorari denied, 338 U.S. 834, and *Hiatt* v. *Hilliard*, 180 F. 2d 453 (C.A. 5)—all holding applicable the sentence provisions contained in the repealed statutes, rather than those established by the new criminal code.

[25] Undoubtedly, the Congress which enacted the Veterans' Emergency Housing Act of 1946 did not intend such a discriminatory result. A proviso was inserted in Section 5 of that Act declaring that notwithstanding any termination of the Act, as contemplated in Section 1 (b) thereof, all of its pro-

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 14

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FORTIER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court for the District of New Hampshire (R. 9) is reported at 89 F. Supp. 708. The opinion of the Court of Appeals for the First Circuit (R. 54) is reported at 185 F. 2d 608.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on December 12, 1950 (R. 59). The petition for a writ of certiorari was filed on March 12, 1951. Certiorari was granted

on May 7, 1951 (R. 59). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether Section 1 (a) of the Housing and Rent Act of 1947 (approved June 30, 1947), in repealing the Veterans' Emergency Housing Act of 1946, made unenforceable maximum sales prices and construction requirements—established under the authority of the latter Act, prior to its repeal, as a part of and condition to the grant of priorities assistance and authority to construct—on houses in construction prior to June 30, 1947, but not sold until November and December 1947.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C. App. § 1821 *et seq.*), of Section 1 (a) of the Housing and Rent Act of 1947 (61 Stat. 193, 50 U.S.C. App. (Supp. I) § 1881), of the Act of March 22, 1944 (58 Stat. 118, 1 U.S.C. (Supp. IV) § 109) and of Priorities Regulation No. 33 of the Civilian Production Administration, as amended June 14, 1946 (11 F. R. 6598), are set forth in the Appendix, *infra*, pp. 50-61.

STATEMENT

1. The Veterans' Emergency Housing Program was inaugurated early in 1946 by Veterans' Housing Program Order No. 1, issued on March 26, 1946 (11 F. R. 3190), in conjunction with Priorities Regulation No. 33, originally effective January 15,

1946 (10 F. R. 15301; 11 F. R. 601),[1] later amended April 12, 1946, and June 14, 1946 (11 F. R. 4085; 11 F. R. 6598). Both of these regulations were issued by the Civilian Production Administration (successor to the War Production Board) under the authority of Title III of the Second War Powers Act (56 Stat. 177, 50 U.S.C. (App.) 633, *infra*, pp. 56-57). The program called for the construction of an unprecedented number of moderate and low-cost housing accommodations to meet the need of returning veterans—a goal which was unattainable unless critical materials were diverted from other, less essential, construction. To that end, Veterans' Housing Program Order No. 1 forbade, generally, the beginning of all new construction without specific prior authorization by the Civilian Production Administration or its designated agents.[2] The restrictions of that Order applied whether or not the materials needed for construction were available without priorities.

By Priorities Regulation No. 33, as amended

[1] As originally promulgated on December 20, 1945 (effective January 15, 1946) (10 F. R. 15301), Priorities Regulation No. 33 established what it called the "Reconversion Housing Program". After the issuance of Veterans' Housing Program Order No. 1, the main program was the Veterans' Emergency Housing Program.

[2] In the case of non-farm housing accommodations, applications were to be filed with the local offices of the Federal Housing Administration; in the case of farm housing, applications were to be filed with the appropriate County Agricultural Conservation Committee. In the case of non-housing construction, the application was to be filed with the appropriate field office of the Civilian Production Administration.

April 12, 1946, and June 14, 1946 (11 F. R. 4085; 11 F. R. 6598), the Civilian Production Administration prescribed the procedures by which construction authorization and priorities assistance could be obtained under the Veterans' Emergency Housing Program. Under that regulation, a builder was required to submit, as part of his application for construction authorization and priorities assistance, the specifications for each unit to be built and a statement of the maximum price at which he proposed to sell each unit.[3] The application was not approved unless the submitted specifications and proposed price were acceptable to the agency to which application was made. Upon approval, the proposed price became the maximum sales price, and the regulation provided (Sec. (g) (1), *infra*, pp. 59-60) that that maximum price must be observed "so long as this regulation remains in effect." Changes in specifications could, however, be made if authorized (Sec. (e), *infra*, p. 59), and, at any time prior to the passing of title, an increase in the sales price could be requested of and approved by the Federal Housing Administration if the builder could show increased construction costs over which he had no control (Sec. (g) (7) *infra*, pp. 60-61).

On May 22, 1946, the Veterans' Emergency Housing Act of 1946 (the Patman Act) was ap-

[3] The builder was also required to agree to grant a preference in selling or renting the housing accommodations to veterans.

proved. That Act created the Office of the Housing Expediter and vested control of the Veterans' Housing Program in the Housing Expediter (*infra*, pp. 50-56); see generally, Rauh, *Government by Directive—A Case History* (1947) 61 Harv. L. Rev. 88. The plan of the program under that Act was a continuation of and remained substantially what it had been under the Civilian Production Administration. Section 4 of the Act (*infra*, p. 53) authorized the Housing Expediter, among other things, to "allocate, or establish priorities for the delivery of, such materials or facilities in such manner, upon such conditions, and to such extent as he deems necessary and appropriate in the public interest and to effectuate the purposes of this Act."[4] Section 3 (*infra*, p. 52), authorized him to set maximum sales prices for all houses completed after May 22, 1946. Section 1 (b) (*infra*, pp. 50-51) provided that the Act, and regulations and or-

[4] The priorities and allocations powers granted by Section 4 of the Veterans' Emergency Housing Act of 1946 were similar in character and extent, though limited to the field of housing, to the powers granted by Title III of the Second War Powers Act, which had previously been the foundation of the Veterans' Housing Program. Compare *infra*, p. 53 with *infra*, pp. 56-57.

Section 4 was inserted in the 1946 Act because of the apprehension that Title III of the Second War Powers Act, which was then scheduled to expire on June 30, 1946, might not be extended for the full term of the 1946 Act. Hearings before the Committee on Banking and Currency, H. of Reps., 79th Cong., 1st Sess., on H. R. 4761, at pp. 310, 314, 348, 428; Hearings before a Subcommittee of the Committee on Banking and Currency, U. S. Sen., 79th Cong., 2d Sess., on H.R. 4761, at p. 155; 92 Cong. Rec. 3327.

ders issued thereunder, were to terminate on December 31, 1947, or on the date fixed by concurrent resolution of both Houses of Congress, whichever date was the earlier. By Section 5 of the Act (*infra*, p. 54) it was made unlawful to sell or agree to sell a housing accommodation at a price in excess of that established by the Housing Expediter, or to violate the terms of any order or regulation issued under the Act. Section 5 (*infra*, p. 54) further provided that:

> Notwithstanding any termination of this Act as contemplated in section 1 (b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

Section 7 (*infra*, pp. 54-56) contained various provisions for criminal and civil enforcement.

On August 27, 1946, the Housing Expediter first exercised the authority granted to him by Sections 4 (dealing with priorities and allocations) and 7 (dealing with enforcement) of the Veterans' Emergency Housing Act of 1946, and immediately delegated to the Civilian Production Administration his powers and authority under those sections of the Act (11 F.R. 9507).[5] The additional authority granted the Civilian

[5] At the same time he promulgated Housing Expediter Priorities Regulation No. 5 (11 F. R. 9508), in which he pro-

Production Administration was exercised the same day by an amendment of Schedule A to Priorities Regulation 33 (11 F.R. 9522).

After the assumption by the Housing Expediter of direct control of the program on August 27, 1946, all approved applications for construction authorization and priorities assistance were subject both to the Second War Powers Act and to the Veterans' Emergency Housing Act of 1946. Upon the expiration of Title III of the Second War Powers Act on March 31, 1947,[6] Priorities Regulation No. 33 was adopted as his own regulation by the Housing Expediter (12 F.R. 2111). It was revoked on December 31, 1947 (13 F.R. 6).

Section 1 (a) of the Housing and Rent Act of 1947 (61 Stat. 193, 50 U.S.C. App. (Supp. I), § 1881, which was approved and became effective on June 30, 1947, repealed Sections 1, 2(b) through 9, 11 and 12 of the Veterans' Emergency Housing Act of 1946, but provided (*infra*, p. 56):

> That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority

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vided that all future applications for construction authorization or priorities assistance would be made under it, rather than under Priorities Regulation No. 33, but that applications which theretofore had been made under Priorities Regulation No. 33 would continue to be processed under the latter regulation. Priorities Regulation No. 5 contains maximum price and construction requirement provisions which are comparable to those in Regulation No. 33, and priorities granted under the former also raise the issue presented in the instant case.

[6] By virtue of Section 3 of the First Decontrol Act of 1947, 61 Stat. 34.

contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.

2. On August 21, 1946, respondents, doing business under the name Modern Building Company, applied to the Federal Housing Administration for construction authorization and priorities assistance, under Priorities Regulation No. 33, for the building of two single-family dwelling units at Derry, New Hampshire (R. 14-15). In accordance with Priorities Regulation No. 33, respondents filed, as part of their application, blueprints and outline specifications of the proposed buildings (R. 15) and a statement of the maximum price at which they proposed to sell the houses. On September 9, 1946, the Federal Housing Administration approved the application, thereby authorizing construction of the units. The ceiling price for each unit was $8,350 (R. 15). The project was assigned an HH priorities rating to enable the builders to obtain certain building materials specified in Schedule A to Priorities Regulation No. 33 (R. 15).

In building the houses, respondents used their priorities ratings to obtain at least some of the materials needed for construction (R. 22-28, 42-44). One of the houses, completed in August 1947, was sold in December 1947, for $12,000 (R. 15). The other, although not completed until January 1948, was sold in November 1947, for $12,800 (R. 15). Neither house was built entirely in accordance with

the specifications approved by the Federal Housing Administration (R. 15). Respondents had not requested nor been given permission to depart from the specifications or to sell at a price in excess of the ceiling (R. 22, 31), although a standard procedure existed, under Priorities Regulation No. 33, for processing requests for increases in maximum sales prices and for changes in the specifications (R. 21-22, 31; see *supra*, p. 4, *infra*, pp. 26 (fn. 14), 33, 44).

The United States brought suit, pursuant to Sections 7.(a) and (c) of the Veterans' Emergency Housing Act (*infra*, pp. 54-55), to compel respondents to make restitution, to the purchasers of the two houses, of the overcharges and the value of construction omissions. After trial, the District Court entered judgment for respondents (R. 13), holding that since the sales took place after the repeal of the Veterans' Emergency Housing Act by Section 1(a) of the Housing and Rent Act of 1947, they could not be violations of that Act or of Priorities Regulation No. 33. The Court of Appeals for the First Circuit affirmed (R. 54-59).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that maximum sales prices and construction requirements, established as a part and condition of the grant of priorities assistance and construction authorization under the Veterans' Emergency Housing Act of 1946, could not be en-

forced as to houses sold after the repeal, on June 30, 1947, of the Veterans' Emergency Housing Act of 1946, by the Housing and Rent Act of 1947.

2. In refusing to hold that Section 1(a) of the Housing and Rent Act of 1947 preserved the respondents' obligation to maintain the maximum prices on their houses sold in November and December 1947.

3. In refusing to hold that Section 109 of Title 1 of the U. S. Code preserved respondents' obligation to maintain the maximum prices on their houses sold in November and December 1947.

4. In affirming the judgment of the District Court which had given judgment for the respondents and against the United States.

SUMMARY OF ARGUMENT

I

Section 1(a) of the Housing and Rent Act of 1947, while repealing the Veterans' Emergency Housing Act of 1946, provided that "allocations made" or "priorities granted" under the authority of the latter Act should "remain in full force and effect." The court below held that, despite this proviso, maximum prices which the builders had agreed to maintain on houses built with the aid of construction authorization and priorities assistance under the Veterans' Emergency Housing Act could not be enforced if the houses were sold after June 30, 1947, the date of the repealing act. The court thought that only the builder's right to preference

in obtaining materials was preserved by Section 1(a). We submit that the opposite conclusion is required by the history of the Veterans' Housing Program and the language and legislative history of the 1947 statute, as well as by the history of subsequent amendments to that act in the light of the contemporaneous administrative interpretation.

A. Maximum sales prices, such as those binding respondents, were not established by the Housing Expediter under Section 3 of the 1946 Act—authorizing general price controls on all housing sales—but were used as a part of, and a condition to, the grant of priorities assistance and construction authorization under Section 4 of the Act, which gave the Expediter allocations-and-priorities powers comparable to those awarded the President by Title III of the Second War Powers Act (the general wartime priorities statute). Similar use of maximum sales prices on housing, as a means of conserving scarce materials, had previously been made under Title III. See *United States* v. *Elade Realty Corp.*, 157 F. 2d 979 (C.A. 2), certiorari denied, 329 U.S. 810. The Veterans' Housing Program—which first began early in 1946 under Title III, and then, after the passage of the Veterans' Emergency Housing Act in the Spring of 1946, was carried on under the authority of Section 4 of the latter Act—continued this practice of utilizing maximum prices as part of the grant of priorities assistance and of authority to construct.

depart from the specifications approved. Were this an ordinary contract there would be no question that the Government, having fully performed its part of the agreement, could force respondents to fulfil their obligations. Whether or not the relationship be characterized as contractual, it cannot be denied that respondents were under a *liability* to perform which but for the repealing Act would have been enforceable against them. Cf. *Herman* v. *Woods*, 175 F. 2d 781 (E. C. A.). This seems especially true when we examine the proviso to Section 5 of the Veterans Emergency Act which provided that notwithstanding any termination of the Act as contemplated in Section 1 (b) thereof all its provisions and those of any regulation issued thereunder should be treated as remaining in force "as to rights or liabilities incurred or offenses committed" thereunder. *Infra*, pp. 17–18.

The legislative history of the Housing and Rent Act of 1947 (repealing the Veterans Emergency Housing Act of 1946) contains only one reference to the problem involved here but it is significant that on that occasion the Chairman and one member of the House Committee considering the bill, and the Federal Housing Commissioner, all agreed that maximum prices on houses already in construction would be observed.[2] Moreover, the

[2] Hearings before the House Committee on Banking and Currency on H. R. 2549, 80th Cong., 1st Sess., p. 226. The

Housing Expediter, contemporaneously with the passage of the 1947 Act, and subsequently, interpreted the Act as preserving maximum sales prices on houses already in construction. As the official charged with administration of the housing program, his interpretation was entitled to great weight. *United States* v. *American Truck-*

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following colloquy took place between Chairman Wolcott, Congressman Monroney, and Mr. Raymond Foley, National Housing Administrator and Federal Housing Commissioner:

"Mr. MONRONEY. One other question. Mr. Chairman, do you consider that this bill will take the ceilings off HH houses?

"The CHAIRMAN. There is a provision in the bill which protects the commitments, already made, up to the effective date of the act. It would not affect any commitments made after that date.

"Mr. MONRONEY. *In other words, the ceilings on houses built with HH priorities would be left as it is now*, which gives you the right, Mr. Foley, to adjust those ceilings up for increased costs of construction where the builders make a case that their construction costs have increased; is that right?

"Mr. FOLEY. That has been our practice in the past, and as I understand, this refers to contracts entered into. I have assumed that that meant the agreement between the builder and the governmental agency that in return for priority aid certain rent ceilings would be applied, or certain sales ceilings would be applied.

"The CHAIRMAN. *I might say for the record now that it is intended to cover any agreement or any commitment made by anyone, which was made under the Patman Act* [the Veterans Emergency Housing Act of 1946].

"Mr. FOLEY. That would leave us then in the situation that you mention, Congressman Monroney.

"Mr. MONRONEY. Well, you would feel that it would be not good for the Government or the veteran to take ceilings off these HH houses, that were built with this priority aid, and on which an agreement had been made by the builder to

ing Associations, 310 U. S. 534. Nor was the Housing Expediter's interpretation of Section 1 (a) unknown to the Congress. On at least two separate occasions, in the hearings before the House Committee on Banking and Currency on the 1948 extension of rent controls,[3] and in the hearings before a subcommittee of the Senate Committee on Banking and Currency on the 1949 extension of rent control,[4] he advised the responsible bodies of Congress of that interpretation and it was not questioned. The failure to question his interpretation is especially significant in that Representative Wolcott, who had introduced the bill which, in part, eventually became Section 1 (a) of the 1947 Act, presided over the meeting of the House Committee at which the Housing Expediter stated his views. Although Congress

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sell at a ceiling price, as fixed by the Federal Housing Administration on adjustment; is that right?.

"Mr. FOLEY. Our position in maintaining that control, when the changes were made in the latter part of last year, was on that basis, that it was an agreement under which certain benefits were supposed to flow both ways and should be maintained." [Italics added.]

H. R. 2549, introduced by Mr. Wolcott, contained language substantially identical to Section 1 (a) of the Housing and Rent Act of 1947. H. R. 3203, which became the Housing and Rent Act of 1947, was later substituted for H. R. 2549.

[3] Hearings before the House Committee on Banking and Currency, "1948 Extension of Rent Controls," 80th Cong., 2d Sess., pp. 23–24.

[4] Hearings before a Subcommittee of the Senate Banking and Currency Committee on Bills Pertaining to the Extension of Rent Control, 80th Cong., 2d Sess., p. 537.

has subsequently drastically amended other Sections of the 1947 Act, it has retained Section 1 (a) unchanged to date.

We believe, in short, that the language of the 1947 Act and all aids to its construction point directly to a different conclusion from that reached by the court below. It may be, as the court below seemed to feel, that the interpretation we urge would be inequitable to some people whose building costs were high, if they could not secure other relief. The short answer is that such relief was available; there was open to the builder, at any time prior to passing of title, a means by which his sales price could have been increased on a showing of increased costs. *Supra,* p. 4. In any event, the interpretation of the court below cuts off relief from hundreds of veterans who paid over-ceiling prices without receiving concomitant increases in value.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1951.

APPENDIX

1. The pertinent portions of the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U. S. C. App. § 1821 *et seq.*) provide as follows:

* * * * *

Section 1 (b):

The provisions of this Act, and all regulations and orders issued thereunder, shall terminate on December 31, 1947, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the provisions of the Act are no longer necessary to deal with the existing national emergency, whichever date is the earlier.

* * * * *

Section 2 (b):

The Housing Expediter, in addition to such other functions and powers as may be delegated to him by the President, is authorized to—

(1) formulate such plans and programs as are necessary to provide for an increased supply of housing accommodations of all kinds and, in particular, of homes available for sale or rental at moderate prices to veterans of World War II and their immediate families;

(2) issue such orders, regulations, or directives to other executive agencies (including the Office of Economic Stabilization and the Office of Price Administration) as may be necessary to provide for

the exercise of their powers in a manner required by or consistent with the execution of the aforesaid plans and programs, and to coordinate the activities of such agencies directed to the execution of such plans and programs. Each executive agency shall carry out without delay the orders, regulations, or directives of the Housing Expediter, and shall, to the extent necessary, modify its operations and procedures from time to time to conform to the directions of the Housing Expediter;

(3) recommend to the President the enactment of such legislation as may be necessary to provide the authority to carry out such plans and programs as are not authorized under existing law;

(4) consult and cooperate with other agencies of the Federal Government, State and local governments, industries, labor, and other groups, both national and local, with respect to the problems created by the housing emergency and the steps which can be taken to remedy it.

* * * * *

Section 3 (a):

Whenever in the judgment of the Expediter the sales prices of housing accommodations the construction of which is completed after the effective date of this Act have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish maximum sales prices for such housing accommodations in accordance with the provisions of this Act. * * *

Section 3 (b):

Any regulation or order issued under the authority of this section with respect to

housing accommodations the construction of which is completed after the effective date of this Act shall provide that no sale of any such housing accommodations shall take place until after the builder thereof has filed with the appropriate agency designated by the Expediter a description of such accommodations, including a statement of the proposed maximum sales price, and has received from such agency a certification that such price is reasonably related to the value of the accommodations to be sold, taking into consideration (1) reasonable construction costs not in excess of the legal maximum prices of the materials and services required for the construction, (2) the fair market value of the land (immediately prior to construction) and improvements sold with the housing accommodations, and (3) a margin of profit reflecting the generally prevailing profit margin upon comparable units during the calendar year 1941. Any prospective seller of such housing accommodations may apply for such certification at any time, including before the commencement of construction, during its progress, or after its completion. In any case where a certification of approval of a proposed maximum sales price has been issued prior to the completion of construction, the prospective seller may, at any time before the first sale, apply for such revision of the maximum sales price previously certified as may be justified by a showing of special circumstances arising during the course of construction and not reasonably to have been anticipated at the time of the issuance of the earlier certification. The first sale of housing accommodations the construction of which

is completed after the effective date of this Act shall not be made at a price in excess of the maximum sales price certified under this subsection. The actual price at which any such housing accommodations is first sold, plus any increases authorized pursuant to subsection (c), shall be the maximum sales price for any subsequent sale of such housing accommodations

* * * * *

Section 4 (a):

Whenever in the judgment of the Expediter there is a shortage in the supply of any materials or of any facilities suitable for the construction and/or completion of housing accommodations in rural and urban areas, and for the construction and repair of essential farm buildings, he may by regulation or order allocate, or establish priorities for the delivery of, such materials or facilities in such manner, upon such conditions, and to such extent as he deems necessary and appropriate in the public interest and to effectuate the purposes of this Act.

* * * * *

Section 5:

It shall be unlawful for any person to effect, either as principal or broker, a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act, or to solicit or attempt, offer, or agree to make any such sale. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act. Notwithstanding any termination of this Act as contemplated in section 1 (b) hereinabove, the provisions of this Act, and of all regu-

lations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

* * * * *

Section 7 (a):

Whenever in the judgment of the Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 5 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, may be granted and if granted shall be granted without bond.

* * * * *

Section 7 (c):

The district courts shall have jurisdiction of criminal proceedings for violations of section 5 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under this section. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases

may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Expediter or the United States Government in any proceeding under this Act.

* * * * *

2. Section 1 (a) of the Housing and Rent Act of 1947 (61 Stat. 193, 50 U. S. C. App. (Supp. I) § 1881) provides as follows:

Section 1 (a):

Sections 1, 2 (b) through 9, and sections 11 and 12, of Public Law 388, Seventy-ninth Congress, are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment of this Act are hereby returned to the Treasury: *Provided,* That any allocations made or committed, or priorities granted for the delivery, or any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.

* * * * *

3. The Act of March 22, 1944 (58 Stat. 118, 1 U. S. C. (Supp. I) § 109) provides as follows:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall

so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

4. Priorities Regulation No. 33 of the Civilian Production Administration (11 F. R. 6598) provides, in relevant part, as follows:

* * * * *

§ 944.54 (e)

Construction of the project. A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, except where he has obtained written approval for a change from the agency which approved the original application.

* * * * *

§ 944.54 (g)

Maximum sales prices and rents—(1) *General.* The restrictions on sales prices and rents contained in this paragraph (g) must be observed so long as this regulation remains in effect. They apply to dwellings of the kinds described below when built or converted under this regulation. Approval of a proposed sales price or rent should be considered merely as a limit upon the

price or rent to be charged. It should not be considered as a statement that the sales price or rent represents the value of the dwelling or the apartment for other purposes. In the case of remodelling or rehabilitation, the Office of Price Administration may reduce the maximum rent specified in the application, unless prior approval of the rent has been obtained from that agency.

* * * * *

§ 944.54 (g) (2) (ii)

A builder must not sell a one-family dwelling built or converted under this regulation, including the land and all improvements (including garage if provided), for more than the maximum sales price specified in the application, as approved, including within this sales price the amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser.

* * * * *

§ 944.54 (g) (7)

Requests for increases in sales prices and rents by builders. A builder may apply to the Federal Housing Administration for an increase in the sales price or rent specified in the application before the house is sold (i. e. before title has passed) or initially rented. The application will not be approved unless he can show that he has incurred or will incur additional or increased costs in the construction over which he had, or has, no control, or if he can show that he will incur additional or increased costs in the operation of rented accommodations over which he has no control, and that these increased or additional costs will make it impracticable for him to

sell or rent at the price or rent specified in the application. No increase in sales price or rent will be granted in excess of the increase in construction cost, or a proper proportion of it, or the increase in operating cost, as the case may be. However, no increase in sales price to an amount more than $10,000 (or $17,000 in the case of a two-family dwelling) will be granted and no increase in shelter rent to more than $80 a month will be granted except on appeal where unusual hardship would result.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1951

No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FORTIER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

construction, including 1 USC 109, clearly point to the conclusion that Congress intended, in preserving allocations and priorities granted under the Veterans' Emergency Housing Act, to preserve maximum prices and construction requirements on houses built with the aid of those allocations or priorities, or, at the least, that it did not repeal the builder's obligation to maintain those prices. Respondents, having asked and received both permission-to-build and priorities assistance, must now be required to observe the conditions upon which such aid was granted. See *United States* v. *Elade Realty Corp.*, 157 F. 2d 979, 981 (C.A. 2), certiorari denied, 329 U. S. 810. It may be, as the court below seemed to feel, that the interpretation we urge would be inequitable to some people whose building costs were high, if they could not secure other relief. The short answer, as we have pointed out, is that such relief was available; there was open to the builder, at any time prior to passing of title, a means by which his sales price could have been increased on a showing of increased costs. *Supra*, p. 26 (fn. 14), 33. In any event, the interpretation of the court below cuts off relief from hundreds of veterans who paid over-ceiling prices contrary to the legislative purpose.

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visions and those of any regulations thereunder, should be treated as remaining in force "as to rights or liabilities incurred or offenses committed" thereunder. *Infra*, p. 54.

II

The United States Is Entitled to Bring This Suit to Enforce Respondents' Obligation Not to Sell at More Than the Maximum Sales Price

In both courts below, respondents questioned the standing of the United States to sue under Section 7 (c) of the Veterans' Emergency Housing Act of 1946. *Infra*, p. 55. The District Court apparently overruled the objection. See R. 49-50. The Court of Appeals did not mention it, and may well have ruled against respondents since the point is logically prior to the merits of the case, which the court did discuss. However, Judge Woodbury, in a concurring opinion, expressed "grave doubt with respect to the standing of the United States under § 7(c) of the Act of 1946, or even of the Expediter, or his successor, to bring suits for restitution, particularly within the year given to buyers by § 7(d) of the Act to do so on their own behalf." (R. 59).[26] It may be that respondents will again raise the point in this Court.

Section 7(a) of the 1946 Act provides:

> Whenever in the judgment of the Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 5 of this Act, he may make application to the appropriate court for an

[26] The sales occurred on December 4, 1947 and November 12, 1947 (R. 15). The complaint was filed on November 9, 1948 (R. 1).

> order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, may be granted and if granted shall be granted without bond.

Section 7(c) gives the district courts jurisdiction of all proceedings under Section 7. *Infra*, p. 55.

It is settled law that the United States can sue in its own name to protect its interest without the joinder of the agent through which it has acted. *United States* v. *Allied Oil Corp.*, 341 U. S. 1, 5; *Erickson* v. *United States*, 264 U. S. 246; *Clallam County* v. *United States*, 263 U. S. 341; *Insurance Co. of North America* v. *United States*, 159 F. 2d. 699 (C.A. 4). Clearly, the United States was here, *vis a vis* the Housing Expediter, the real party in interest and, therefore, was entitled to maintain suit in its own name, even though Section 7(a) speaks of the Expediter's making application to the appropriate court. See *Keele* v. *United States*, 178 F. 2d 766, 768-9 (C.A. 5); *United States* v. *Allied Oil Corp.*, *supra*. See also the Government's Brief in the *Allied Oil* case, No. 364, Oct. Term, 1950, at pp. 16 *et seq.* A large number of suits have been brought by the United States to enforce rights under Section 7 (a), and in no case, so far as we

are aware, has the standing of the United States been denied.

Similarly, there can be no question, since the recent decision of this Court in *United States* v. *Moore*, 340 U. S. 616, that a suit for restitution can be brought under Section 7(a). And cf. *Porter* v. *Warner Holding Co.*, 328 U. S. 395. In the *Moore* case, this Court held that Section 206(b) of the Housing and Rent Act of 1947 authorized a suit for restitution of rent overcharges even though, because the area in which the rental units involved were located had been decontrolled before suit was instituted, no suit for injunction would lie. In its pertinent phraseology, Section 206(b) of the Housing and Rent Act is substantially identical with Section 7(a) of the Veterans' Emergency Housing Act. Compare 340 U. S. at 618-619 with *supra*, p. 45.[27]

The only remaining question can be whether the suit by the United States is premature if brought within the year in which the buyer could himself have sued under Section 7(d) (*infra*, pp. 55-56). We submit that it clearly is not. Suit by the United States was permitted by the Act to protect the interest of the United States. *Keele* v. *United States*, *supra*. In the case of a threatened

[27] In its Brief in the *Moore* case, No. 344, Oct. Term, 1950, at pp. 12, 15, the Government pointed out the similarity in treatment of restitution actions under Section 206(b), there involved, and comparable statutes governing maximum sales prices on houses, such as Section 7, involved here.

violation of the Act, a suit for injunction would be proper and the injunction, if granted, would sufficiently protect the interest of the United States. When, however, the violation had already occurred, only restitution would protect the United States' special interest and, therefore, a suit for restitution is proper. *United States* v. *Moore, supra.* But the power of the United States to protect its interest should in no way be dependent on the exercise or non-exercise by the buyer of his right to sue for restitution within ~~a year after~~ the sale. Normally, the United States may sue to enforce its rights and interests without waiting for action by some private party whose interests are also involved, and Section 7(d) does not purport to modify this established rule or to cut down the generality of Section 7(a), which authorizes suit "whenever" the Expediter believes that a violation has occurred. This suit is not brought in lieu of suit by the buyer but is brought independently to enforce the obligation of respondents to the United States. In the circumstances, it is plain that the bringing of suit by the United States was proper.[28]

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[28] Of course, the year for suit by the buyers under Section 7(d) has long elapsed (see fn. 26, *supra*, p. 45), and at this stage of the litigation there would hardly appear to be any substantial bar to the continuation by the United States of the present suit, even if Judge Woodbury is right in thinking that the United States should not have originally brought suit until the year had fully passed. As noted above (fn. 26), the suit was brought shortly before the year expired.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be reversed and the cause remanded for entry of judgment for the United States.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

OSCAR H. DAVIS,
Special Assistant to the Attorney General.

SAMUEL D. SLADE,
ARTHUR W. MURPHY,
Attorneys.

SEPTEMBER 1951.

APPENDIX

1. The pertinent portions of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C. App. § 1821 *et seq.*), provided as follows:

> SEC. 1. (a) The long-term housing shortage and the war have combined to create an unprecedented emergency shortage of housing, particularly for veterans of World War II and their families. This requires during the next two years a house-construction program larger than ever before. The first step toward such a program is to overcome the serious shortages and bottlenecks with respect to building materials, to expedite the production of such materials, to allocate them for house construction and other essential purposes, and to accelerate the production of houses with preferences for veterans of World War II and at sales prices or rentals within their means. To carry out this program, it is necessary to invest a housing expediter with adequate powers, including the power to issue policy directives. Accomplishment of these objectives will assist returning veterans to acquire housing at fair prices, stimulate industry and employment, prevent a post-emergency collapse of values in the housing field, and promote a swift and orderly transition to a peacetime economy.
>
> (b) The provisions of this Act, and all regulations and orders issued thereunder, shall terminate on December 31, 1947, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring

that the provisions of the Act are no longer necessary to deal with the existing national emergency, whichever date is the earlier.

* * * * *

SEC. 2. (b) The Housing Expediter, in addition to such other functions and powers as may be delegated to him by the President, is authorized to—

(1) formulate such plans and programs as are necessary to provide for an increased supply of housing accommodations of all kinds and, in particular, of homes available for sale or rental at moderate prices to veterans of World War II and their immediate families;

(2) issue such orders, regulations, or directives to other executive agencies (including the Office of Economic Stabilization and the Office of Price Administration) as may be necessary to provide for the exercise of their powers in a manner required by or consistent with the execution of the aforesaid plans and programs, and to coordinate the activities of such agencies directed to the execution of such plans and programs. Each executive agency shall carry out without delay the orders, regulations, or directives of the Housing Expediter, and shall, to the extent necessary, modify its operations and procedures from time to time to conform to the directions of the Housing Expediter;

(3) recommend to the President the enactment of such legislation as may be neces-

sary to provide the authority to carry out such plans and programs as are not authorized under existing law;

(4) consult and cooperate with other agencies of the Federal Government, State and local governments, industries, labor, and other groups, both national and local, with respect to the problems created by the housing emergency and the steps which can be taken to remedy it.

* * * * *

SEC. 3. (a) Whenever in the judgment of the Expediter the sales prices of housing accommodations the construction of which is completed after the effective date of this Act have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish maximum sales prices for such housing accommodations in accordance with the provisions of this Act. Any such regulation or order may be limited in its scope to such geographical area or areas and to such types or classifications of such housing accommodations as in the judgment of the Expediter may be necessary to effectuate the purposes of this Act. Before issuing any regulation or order under this section, the Expediter shall, so far as practicable, advise and consult with representative members of industries affected by such regulation or order, and he shall give consideration to their recommendations and to any recommendations which may be made by State and local officials concerned

with housing conditions in any area affected by such regulation or order.

* * * * *

SEC. 4. (a) Whenever in the judgment of the Expediter there is a shortage in the supply of any materials or of any facilities suitable for the construction and/or completion of housing accommodations in rural and urban areas, and for the construction and repair of essential farm buildings, he may, by regulation or order allocate, or establish priorities for the delivery of, such materials or facilities in such manner, upon such conditions, and to such extent as he deems necessary and appropriate in the public interest and to effectuate the purposes of this Act.

(b) In issuing any regulation or order allocating or establishing priorities for the delivery of any materials or facilities under this section, the Expediter shall give special consideration to (1) satisfying the housing requirements of veterans of World War II and their immediate families, (2) the need for the construction and repair of essential farm buildings, and (3) the general need for housing accommodations for sale or rent at moderate prices. In order to assure preference or priority of opportunity to such veterans or their families, the Expediter shall require that no housing assisted by allocations or priorities under this section shall be sold within 60 days after completion or rented within 30 days after completion for occupancy by persons other than such veterans or their

families: *Provided,* That the Expediter by appropriate regulation may allow for hardship cases.

* * * * *

SEC. 5. It shall be unlawful for any person to effect, either as principal or broker, a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act, or to solicit or attempt, offer, or agree to make any such sale. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act. Notwithstanding any termination of this Act as contemplated in section 1 (b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

* * * * *

SEC. 7. (a) Whenever in the judgment of the Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 5 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to

engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, may be granted and if granted shall be granted without bond.

* * * * *

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 5 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under this section. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Expediter or the United States Government in any proceeding under this Act.

(d) If any person selling housing accommodations violates a regulation or order prescribing a maximum selling price, the person who buys such housing accommodations may, within one year from the date of the occurrence of the violation, bring an action

for the amount by which the consideration exceeded the maximum selling price, plus reasonable attorney's fees and costs as determined by the court.

* * * * *

2. Section 1 (a) of the Housing and Rent Act of 1947, Act of June 30, 1947 (61 Stat. 193, 50 U.S.C. App. (Supp. I) § 1881) provides as follows:

Section 1 (a):

Sections 1, 2 (b) through 9, and sections 11 and 12, of Public Law 388, Seventy-ninth Congress, are hereby repealed and any funds made available under said sections of said Act not expended or committed prior to the enactment of this Act are hereby returned to the Treasury: *Provided,* That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.

* * * * *

3. The pertinent portions of Title III of the Second War Powers Act (56 Stat. 177, 50 U.S.C. App. 633) provided as follows:

* * * * *

Whenever the President is satisfied that the fulfillment of requirements for the defense of

the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

* * * * *

4. The Act of March 22, 1944 (58 Stat. 118, 1 U.S.C. (Supp. IV.) § 109) provides as follows:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still

remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

5. Priorities Regulation No. 33 of the Civilian Production Administration, as amended June 14, 1946, (11 F. R. 6598) provided, in relevant part, as follows:

* * * * * * *

§944.54 (a).

What this regulation does. (1) *General.* This regulation provides priorities assistance to carry out the Veterans' Emergency Housing Program which calls for the construction of moderate and low-cost housing accommodations to meet the needs of returning veterans and members of the Armed Forces. It also provides for giving specific authorization under the Civilian Production Administration Veterans' Housing Program Order 1 to persons wishing to construct, repair, make additions or alterations to, improve or convert, or install fixtures or mechanical equipment in housing accommodations. This regulation explains who may apply for such an authorization and for priorities assistance (an HH rating and the right to place certified orders, generally referred to in this regulation simply as HH ratings), the circumstances under which applications will be approved, the way in which the priorities assistance given under the regulation may be used, and the conditions which will be imposed on the builder and suc-

ceeding owners in selling or renting the accommodations as long as this regulation is in force. Schedule A to this regulation lists the materials for which priorities assistance given under the regulation may be used. * * *

* * * * *

§ 944.54 (e).

Construction of the project. A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, except where he has obtained written approval for a change from the agency which approved the original application.

* * * * *

§ 944.54 (g).

Maximum sales prices and rents—(1)—*General.* The restrictions on sales prices and rents contained in this paragraph (g) must be observed so long as this regulation remains in effect. They apply to dwellings of the kinds described below when built or converted under this regulation. Approval of a proposed sales price or rent should be considered merely as a limit upon the price or rent to be charged. It should not be considered as a statement that the sales price or rent represents the value of the dwelling or the apartment for other purposes. In the case of remodelling or rehabilitation, the Office of Price Administration may

reduce the maximum rent specified in the application, unless prior approval of the rent has been obtained from that agency.

* * * * *

§ 944.54 (g) (2) (ii).

A builder must not sell a one-family dwelling built or converted under this regulation, including the land and all improvements (including garage if provided), for more than the maximum sales price specified in the application, as approved, including within this sales price the amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser.

* * * * *

§ 944.54 (g) (7).

Requests for increases in sales prices and rents by builders. A builder may apply to the Federal Housing Administration for an increase in the sales price or rent specified in the application before the house is sold (i.e. before title has passed) or initially rented. The application will not be approved unless he can show that he has incurred or will incur additional or increased costs in the construction over which he had, or has, no control, or if he can show that he will incur additional or increased costs in the operation of rented accommodations over which he has no control, and that these increased or additional costs will

make it impracticable for him to sell or rent at the price or rent specified in the application. No increase in sales price or rent will be granted in excess of the increase in construction cost, or a proper proportion of it, or the increase in operating cost, as the case may be. However, no increase in sales price to an amount more than $10,000 (or $17,000 in the case of a two-family dwelling) will be granted and no increase in shelter rent to more than $80 a month will be granted except on appeal where unusual hardship would result.

* * * * * *

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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FORTIER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CITATIONS

Cases:

Cases—Continued

Miscellaneous—Continued

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REPLY BRIEF FOR THE UNITED STATES

This reply brief is directed to (1) certain arguments made by respondents on the question presented by the Government's petition for certiorari, and (2) the defensive matters which respondents raise (Resp. br. 23–36) but which the Court of Appeals did not consider.

I

A. *Amendments to Priorities Regulation No. 33.*—At pages 11–13 of their brief, respondents apparently argue that, immediately after the repeal of the Veterans Emergency Housing Act of 1946 on June 30, 1947, the Housing Expediter interpreted the repealing statute as cutting off his

power to maintain and enforce maximum sales prices which had been established as a part of, and a condition to, the grant of construction-authorization and priorities assistance under the 1946 Act. The truth is, as we point out at pages 32–33 of our main brief, that from the time of its passage the Housing Expediter (and his delegate, the Federal Housing Administration) construed Section 1 (a) of the Housing and Rent Act of 1947 as continuing in full force and effect those maximum sales prices, and it was on that basis that a great number of applications for price increases were accepted and processed from June 30, 1947 to December 31, 1947. In fact, the Housing Expediter vigorously defended a purchasers' suit against him which claimed that he (and his delegates) had been divested of all authority to grant price increases after June 30, 1947, but that the original maximum prices nevertheless continued in effect. *Nesseth* v. *Creedon*, 80 F. Supp. 269, 273 *et seq.* (D. Minn.). It was the Expediter's contention, which the court adopted, that the 1947 Act continued in effect both the maximum prices and the Expediter's power to increase them.

As both respondents, and our main brief point out (Govt.'s main br., p. 32; Resp. br., pp. 11–13), the Expediter did amend, immediately after the enactment of the 1947 Act, the veterans' preference and maximum *rent* provisions of Priori-

ties Regulation No. 33. But these two changes were made because the Housing and Rent Act of 1947 expressly indicated that its new and specific provisions as to veterans' preference and maximum rents were thereafter to be controlling in all cases, including situations previously governed by different rules promulgated under the 1946 Act. Section 4 (a) of the 1947 Act provided that its veterans' preference requirements were to control *all* dwellings "completed after the date of enactment of this title [*i. e.*, June 30, 1947] and prior to March 1, 1948," and added, by way of explicit clarification, that these new requirements were not to "affect or remove any veteran's preference requirements heretofore established under Public Law 388, Seventy-ninth Congress [*i. e.*, the Veterans' Emergency Housing Act of 1946], and outstanding with respect to housing accommodations *completed prior to the date of the enactment of this title.*" 61 Stat. 195–196, 50 U. S. C. App, Supp. I, 1884 (a) (italics supplied). Congress clearly established a permanent statutory veterans' preference system for all new housing, whether priorities-assisted or not.

As for maximum rents (which had also been established, in some cases, under Priorities Regulation No. 33) Title II of the 1947 Act ("Maximum Rents") indicated that maximum rents of any kind were thereafter to be established and

maintained only in certain localities and circumstances, and that all rent control was thereafter to be carried on only under the provisions of Title II.[1] Accordingly, the Expediter amended Priorities Regulation No. 33 to conform to the new rent requirements which Congress had imposed on all housing. 12 F. R. 4434.

The 1947 Act did not contain comparable provisions regarding maximum *sales prices,* and therefore the Expediter did not find it necessary to amend the Regulation, in that respect, in order to conform to the new Act. Instead, as stated above, the maximum price requirements of Priorities Regulation No. 33 continued in full force.

[1] Section 202 of the 1947 Act provided in part (61 Stat. 197):

* * * * * * *

(c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include—

* * * * * * *

(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946 [*i. e.*, the Veterans' Emergency Housing Act of 1946], shall remain in full force and effect; or (B) which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations.

and effect until the regulation was revoked on December 31, 1947.

In this same connection, we may also point out the error in the inference drawn by the Court of Appeals (R. 57) from the fact that, in the 1947 Act, Congress dealt in specific terms with some aspects of veterans' housing. The court seemed to think that, since Congress addressed itself in terms to the problem of veterans' preference, it would also have dealt expressly with maximum sales prices if it had intended to keep them in force. But, as pointed out above, Congress dealt in detail with the problem of veterans' preference and maximum rents because it desired to change and amend the existing regulations and requirements, to establish certain new requirements, and to enact a sort of statutory code on these subjects. Having no such purpose with respect to maximum selling prices, Congress found it unnecessary to mention them *in haec verba;* as our main brief shows, the savings clause in Section 1 (a) was both sufficient to keep the old sales price requirements in effect and an apt vehicle for that purpose. The words "allocations made or committed, or priorities granted * * * shall remain in full force and effect" continued in effect (until changed by regulation) all aspects of the grant of priorities assistance and construction authorization.

B. *Legislative history of the 1947 Act.*—The legislative history quoted by respondents at pp.

14–16 of their brief does not support their position.

As we point out in footnote 14 of our main brief (pp. 26–7), after the expiration of general price control, in the Fall of 1946, the Housing Expediter decided to eliminate maximum sales prices on houses (i) not yet under construction *and* (ii) as to which construction authorization and priorities assistance had not been secured under either Priorities Regulation No. 33 or Priorities Regulation No. 5. This was done by Housing Permit Regulation No. 1 (HPR), issued December 24, 1946. This Regulation also provided that a person to whom a priority and construction authorization had been granted under Priorities Regulation No. 33 or No. 5, but who had not begun the construction of all the dwellings approved in his application, might choose to return his priority to FHA and to apply for a permit under the HPR (thus eliminating the sales price restriction) for the construction of the dwellings on which construction had not begun.[2]

All of the material quoted by respondents from Housing Expediter Creedon's testimony, in March 1947, before the House Committee on Banking and Currency deals either with (a) the terms and effect of this new Housing Permit

[2] Respondents were not eligible to make application under the provisions of the HPR because their two houses had already been begun. In any event, they made no such application.

Regulation (HPR), which had been issued on December 24, 1946, or with (b) the fact that price controls on building *materials and supplies* had been lifted in the Fall of 1946. Mr. Creedon did not say or intimate that house maximum sales prices would not, or should not, be continued on houses already being constructed under a grant of priorities assistance and construction authorization. On the contrary, he specifically said at the very same hearing: "The maximum sales price limitation continues in effect only on housing which has the benefit of priorities assistance. Granting of priorities was discontinued on December 25, 1946." Hearings before the House Committee on Banking and Currency on H. R. 2549, 80th Cong., 1st Sess., at p. 40. And all of his remarks—including those quoted by respondents—show that he considered every commitment which had been made as a part of the prior grant of priorities assistance and construction authorization to be still in effect.[3] He did not say or suggest that the maximum price restriction had been eliminated on housing then in construction or that it was not still a part of, or a condition to, the grant to the builder.

Moreover, the later colloquy which we quote at pp. 29–31 of our main brief is the only portion of the legislative history of the 1947 Act specifi-

[3] For instance, he was careful to say, not that priorities ceased or were eliminated on December 24, 1946, but that the "issuance of them" stopped on that date. See Resp. br., p. 15.

cally directed toward the purpose and meaning of Section 1 (a), which preserved all "allocations made or committed" and "priorities granted" under the 1946 Act; and that significant interchange shows affirmatively that price commitments made under the 1946 Act were preserved by Section 1 (a). As we have just shown, nothing said by Mr. Creedon clashes with that understanding.

II

The issues discussed by respondents at pages 23–35 of their brief were not adverted to by the majority of the court below. We do not know whether the Court, if it sustains the Government's position on the main issue, will care to pass upon these other matters of defense or whether it will prefer to remand the case to the First Circuit for consideration of those issues. We set forth the Government's position on these questions, so that the Court may have it available if the issues are reached.

A. *Suit by the United States for restitution.*—In Point II of our main brief (pp. 45–48), we urge that the United States may bring this type of restitution action and need not wait until one year after the sale. *United States* v. *Moore*, 340 U. S. 616—a maximum rent case—seems to us to be controlling on the right of the United States to sue for restitution even though maximum price restrictions and the Veterans' Emergency

Housing Act of 1946 are no longer in effect. In addition, three circuits have so held with respect to maximum sales price restrictions on priority-assisted housing. *United States* v. *Carter*, 171 F. 2d 530 (C. A. 5); *Keele* v. *United States*, 178 F. 2d 766 (C. A. 5); *United States* v. *Murtaugh*, 190 F. 2d 407, 408 (C. A. 4); *Doernhoefer* v. *United States*, C. A. 8, No. 14,263, decided July 30, 1951, pending on supplemental petition for rehearing based on the main issue in the present case (*i. e.*, post-June 30, 1947 sales). Several district courts have also so held.

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Respondents seem to suggest that, although the wording of Section 206 (b) of the Housing and Rent Act of 1947 (involved in the *Moore* case) is substantially identical with Section 7 (a) of the Veterans' Emergency Housing Act of 1946 (involved here), a difference in construction is required by the legislative history of the 1946 Act. The suggestion appears to be that Congress eliminated a specific provision giving the United States the right to bring a money suit and thus must have intended to withdraw the authority to sue for restitution which would otherwise have been found in Section 7 (a). Resp. br., pp. 9, 24.[4]

As it was introduced and passed the House, the bill which became the Veterans' Emergency Housing Act of 1946 contained a separate provi-

[4] The *amicus curiae* brief filed on behalf of Elmer G. Doernhoefer makes this point at greater length.

sion—in addition to the general subsection which became Section 7 (a)—empowering the purchaser to sue, within one year of the violation of a maximum price requirement, for *treble* damages, and also providing that "if the buyer fails to bring an action under this subsection within 60 days from the date of the violation, the Expediter may bring such action on behalf of the United States within 1 year from the date of the violation. If such action is brought by the Expediter, the buyer shall thereafter be barred from bringing an action for the same violation." 92 Cong. Rec. 1997; H. Rept. No. 1580, 79th Cong., 2d Sess., p. 17. The same provision was retained by the Senate Committee. S. Rept. No. 1130, 79th Cong., 2d Sess., p. 12. On the floor of the Senate, permission to the buyer to sue for "treble" damages was first eliminated (92 Cong. Rec. 3326–7), and then the right of the United States to bring an action, upon failure of the buyer to sue, was deleted. 92 Cong. Rec. 3430. This change was accepted by the conference committee and the House. H. Rept. No. 2000, 79th Cong., 2d Sess., p. 12. Section 7 (d) of the 1946 Act (Govt's main br., pp. 55–56) contains the provision for single damage suits by the buyer which the Congress retained.

This history does not cast any doubt on the right of the United States to bring suit for restitution under Section 7 (a) because it plainly "deals with different matters." Circuit Judge Russell (then

District Judge) in *United States* v. *Bryan*, N. D. Ga., Civ. Action No. 3446, Sept. 21, 1949. The suit which Congress eliminated was a suit "on behalf of the United States" for *statutory damages* for a sale at an over-ceiling price *and the recovery would go to the United States and not to the veteran-purchaser.* Apparently, the 79th Congress did not want this particular remedy—which had been added in 1944 to the Emergency Price Control Act of 1942 and which was, after a period of non-use, re-adopted for rent cases by the 1949 amendments to the Housing and Rent Act of 1947—to be employed in this class of case. See 92 Cong. Rec. 3326–3327 (Sen. Barkley).[5]

[5] The eliminated provision was substantially the same as Section 205 (e) of the Emergency Price Control Act of 1942, as amended by the Stabilization Extension Act of 1944. 58 Stat. 632, 640–1. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 401–2. The Housing and Rent Act of 1947, as originally enacted, did not contain any similar provision, but one was added for rent cases (Section 205) by the Act of March 30, 1949, Title II, Sec. 204, 63 Stat. 27, because Congress felt that the previous provisions of the 1947 Act had not proven effective in securing compliance. S. Rept. No. 127, 81st Cong., 1st Sess., pp. 10–11, 17.

Under these provisions (*i. e.*, Section 205 (e) of the Emergency Price Control Act of 1942, and Section 205 of the Housing and Rent Act of 1947, as amended), the recovery goes to the United States. *Porter* v. *Warner Holding Co.*, 328 U. S. at 401–2, 406; *Orenstein* v. *United States*, C. A. 1st, Nos. 4556–7, decided July 25, 1951; *United States* v. *Gianoulis*, 183 F. 2d 378 (C. A. 3); *Mattox* v. *United States*, 187 F. 2d 406 (C. A. 9), pending on petition for a writ of certiorari, No. 110, this Term; *Miller* v. *United States*, 186 F. 2d 937, pending on petition for a writ of certiorari, No. 182, this Term.

But there was no indication that the separate remedy of restitution, in which the recovered money goes to the purchaser, was also to be eliminated. On the contrary, Congress used the same words in Section 7 (a) which it had earlier used in Section 205 (a) of the Emergency Price Control Act of 1942 (the basis of *Porter* v. *Warner Holding Co.*, 328 U. S. 395) and later used in Section 206 (b) of the Housing and Rent Act of 1947 (the basis of *United States* v. *Moore*, 340 U. S. 616). Only the separate and distinct remedy of statutory damages collectible by the United States was eliminated.[6]

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[6] In *Porter* v. *Warner Holding Co.*, *supra*, at p. 402, the Court held that the 1944 addition of section 205 (e) to the Emergency Price Control Act of 1942 did not "whittle down the equitable jurisdiction recognized by § 205 (a) so as to preclude a suit for restitution." Similarly, the elimination of a provision comparable to Section 205 (e) from the Veterans' Emergency Housing Act of 1946 could not whittle down the equitable jurisdiction granted by Section 7 (a). In this connection, it is noteworthy that although the Housing and Rent Act of 1947, as originally enacted on June 30, 1947, contained no provision for statutory damages for violation of rent ceilings (see fn. 5, *supra*), the courts had no difficulty in ordering restitution, under Section 206 (b), during the period from June 30, 1947 to March 30, 1949 (when the provision for damages was added).

On the separateness of the remedies of restitution and statutory damages, see the Government's brief in opposition in No. 110, this Term, *Mattox* v. *United States*, at pp. 8–10.

B. *Jury trial.*—If the respondents are still insisting on their demand for jury trial (see Resp. br., p. 29), the answer is that a restitution action is an equitable cause (*Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398, 399, 400, 401, 402, 403; *United States* v. *Moore*, 340 U. S. 616, 619) and defendants are not entitled to a jury trial in equitable causes. *Parsons* v. *Bedford*, 3 Pet. 433, 446–7; *Labor Bd.* v. *Jones & Laughlin*, 301 U. S. 1, 48. This has been the uniform holding in rent restitution cases, both under the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947. *McCoy* v. *Woods*, 177 F. 2d 354, 355 (C. A. 4); *McCoy* v. *Woods*, 177 F. 2d 355, 356 (C. A. 4); *Orenstein* v. *United States*, C. A. 1, No. 4556, decided July 25, 1951; *Co-Efficient Foundation, Inc.* v. *Woods*, 171 F. 2d 691, 693–4 (C. A. 5); *United States* v. *Friedland*, 94 F. Supp. 721, 723–724 (D. Conn.); *United States* v. *Cowen's Estate*, 91 F. Supp. 331, 332 (D. Mass.); *United States* v. *Shaughnessy*, 86 F. Supp. 175 (D. Mass.); *United States* v. *Hart*, 86 F. Supp. 787, 789 (E. D. Va.); *United States* v. *Strymish*, 86 F. Supp. 999, 1000 (D. Mass.); *Woods* v. *Hodge*, 88 F. Supp. 262, 263 (W. D. La.); *Woods* v. *Blake*, 84 F. Supp. 570, 572 (D. N. J.); *Woods* v. *Sofronski*, No. 7801 (E. D. Pa.); *Woods* v. *Stein* (E. D. Wash.), decided July 20, 1948; *Woods* v. *Deep Vein Connellsville Coal Co.*, No. 7518

(W. D. Pa.); *Woods* v. *Swanson* No. 7560 (W. D. Pa.), decided January 10, 1950, Maris, C. J. sitting; *Woods* v. *Wilson,* No. 7830 (E. D. Pa.); *Woods* v. *Zellars,* No. 9314 (E. D. Pa.).[7]

The few district courts which have had occasion to pass on the question in a suit for restitution of an over-ceiling sales price under Section 7 (a) of the Veterans' Emergency Housing Act of 1946, here involved, have made the same holding. *United States* v. *Main,* N. D. Ohio, Civil Action No. 26,379, decided May 15, 1950; *United States* v. *White,* N. D. Ala., Civil Action No. 786, decided June 7, 1951; instant case (D. N. H.), at R. 16.

C. *Alleged "equitable defenses".*—Great stress is laid by respondents on a number of factors which they claim as "equitable defenses" barring relief in this case (Resp. br., pp. 29–36). Restitution, it is true, is an equitable action and the chancellor has a degree of discretion in granting and molding relief. *Porter* v. *Warner Holding Co., supra; United States* v. *Moore, supra;* cf. *Hecht Co.* v. *Bowles,* 321 U. S. 321. But it is also true that in a statutory restitution proceeding

[7] There is a split of decisions on the different question of whether the defendant is entitled to a jury trial where the action is for statutory damages under Section 205 of the Housing and Rent Act of 1947, as added by the Act of March 30, 1949, sec. 204, 63 Stat. 27 (*supra*, p. 11). The *Orenstein, Friedland, Strymish,* and *Hart* cases, *supra,* hold that the defendant is so entitled; the *Shaughnessy* case, and some unreported district court decisions, hold that he is not. The issue is currently being litigated.

this discretion is confined by, and must be exercised in the light of, the important public objectives Congress seeks to attain by the particular statute. See *Hecht Co.* v. *Bowles, supra,* at 330–331; *Porter* v. *Warner Holding Co., supra,* at 400, 402; *United States* v. *Moore, supra,* at 619. Applying this standard, equity courts have not been moved in comparable cases to deny restitution because of the factors which respondents present here.[8]

1. Greatest emphasis is put by respondents upon the fact that extras and additions were made to the plans originally filed with the F. H. A., and it is claimed that F. H. A. would have increased the prices, if application had been made to it; it is said, moreover, that the houses were fully worth what was paid for them, that the purchasers received full value for their money, and that they will be the recipients of a "windfall" if restitution is ordered. See Resp. br., p. 32 *et seq.* Similar arguments have uniformly been rejected by the Courts of Appeals in rent restitution cases where landlords have proved increased services or furnishings and have sought to bar restitution to the tenant of an overceiling rent on that ground. In each case, the appellate court has said that the landlord should have resorted to the established administrative procedure

[8] The District Court rejected all of these so-called "equitable defenses". See R. 31, 32–34, 35–36, 38, 39, 47–48.

in order to secure his desired increase in maximum rent, and cannot be heard to say that, despite his failure, equity will take account of the increased value of the lodgings furnished the tenant. *Elma Realty Co.* v. *Woods*, 169 F. 2d 172, 174 (C. A. 1); *Woods* v. *Dodge*, 170 F. 2d 761, 763 (C. A. 1); *Forde* v. *United States*, 189 F. 2d 727, 730–1 (C. A. 1); *Woods* v. *Polis*, 180 F. 2d 4, 6–7 (C. A. 3); *Creedon* v. *Olinger*, 170 F. 2d 895, 897 (C. A. 5); *United States* v. *Sharp*, 188 F. 2d 311, 313 (C. A. 9); cf. *Thierry* v. *Gilbert*, 147 F. 2d 603, 604 (C. A. 1) (statutory damage action for overceiling rent).

Like all of those landlords, respondents had an accessible administrative procedure by which to obtain an increase in the ceiling price and permission to make additions and to change the plans and specifications. See R. 31–2, 31; Govt's main brief, pp. 4, 9, 26 (fn. 14), 33, 44, 59, 60–1.[9] They did not make use of this procedure, and the teaching of the cases is that the restitution court will not substitute itself for the administrative agency even though the defendant was "undoubtedly entitled to an upward adjustment" (169 F. 2d at 174) or the result seems harsh to the defendant and indulgent to the person to whom restitution is ordered (170 F. 2d at 763,

[9] It is to be noted that on December 13, 1946, the expediter removed the over-all $10,000 limitation on sales prices which had previously been in effect. Govt's main brief, p. 26, fn. 14.

896).[10] Vindication of the public interest in maintaining required procedures and in obedience to lawful regulation takes precedence over the balancing of purely private interests.[11]

2. These considerations are even more potent in overceiling sales price restitution cases brought under Section 7 (a) of the Veterans' Emergency Housing Act of 1946 because these actions seek to enforce two special public interests which override private builder-purchaser "equities". The first stems from the use of maximum prices and official approval-of-specifications as twin engines for the conservation of scarce materials (see Govt's main brief, pp. 19–27). For the builder to make additions and incorporate extras without official approval, as respondents did, may possibly not be harmful to the purchaser, but it clearly violates the builder's obligation to the Government to conserve building materials, and *pro tanto* impairs one important objective of the grant of priorities assistance and construction authorization. In these circumstances, even though a restitution order be thought to bring an unfair "windfall" to the purchaser at the

[10] *Doernhoefer* v. *United States*, C. A. 8, No. 14,263, decided July 30, 1951 (*supra*, p. 9), upheld the trial court's refusal, in a restitution action under Section 7 (a), to allow an F. H. A. witness to testify that he would have given the builder an increase in maximum sales price, if application had been made.

[11] For the same reasons, "inspections" by an F. H. A. representative who is alleged to have seen the additions and said nothing (Resp. br., pp. 4, 32) must be put aside. See, also, fn. 13, *infra*, p. 20.

expense of the builder, it is fully appropriate as an order enforcing compliance and obedience with the statute and the regulation in their public aspects. Cf. *Ebeling* v. *Woods*, 175 F. 2d 242, 245 (C. A. 8); *Beatty* v. *United States*, C. A. 8, No. 14, 198, decided September 6, 1951.

The second special interest is the Government's concern with providing housing to veterans "at sales prices or rentals within their means" (Section 1 (a) of the 1946 Act, Govt's main br., p. 50), and at "moderate prices" (Sections 2 (b) and 4 (b), Govt's main br., pp. 51, 53). Congress was not concerned merely with assuring veterans that they would obtain their "money's worth" or "full value". It sought to foster inexpensive housing, housing at moderate prices; and overceiling sales tend to detract from that purpose no matter how valuable the additions or how profitless the sale. The prime statutory aim of channeling scarce building materials into low-cost and moderate-cost housing would obviously be frustrated if builders could construct more expensive and more material-consuming dwellings, without administrative approval, and then resist full restitution of the overcharge by the claim that the excess over the ceiling price merely represented the fair value of the extras and additions.[12]

[12] In *United States* v. *Duke Building Corp.*, 79 F. Supp. 681, 683 (S. D. Fla.), the District Court ordered restitution, in an action under Section 7 (a), even though important additions and extras had been made at the request of the

3. The other factors mentioned by respondents are also unavailing. The fact that a loss was suffered does not defeat restitution in rent overceiling cases and likewise should be ineffective in housing overceiling sales cases. See, to this effect, *United States* v. *Duke Building Corp.*, 79 F. Supp. 681, 683 (S. D. Fla.); *United States* v. *Austin*, D. Md., Civil Action No. 4368, decided January 24, 1951; instant case at R. 33, 35–6, 38, 39, 47–48; *Elmers* v. *Shapiro*, 91 C. A. 2d 741, 755–6, 205 P. 2d 1052, 1060–1; cf. *United States* v. *Schroeder*, 164 F. 2d 647, 648 (C. A. 7); *United States* v. *Elade Realty Corp.*, 157 F. 2d 979, 981 (C. A. 2), certiorari denied, 329 U. S. 810 (criminal overceiling-sales cases). Appraisal of the houses by the Veterans' Administration (for "G. I." loan purposes) at their sales prices (Resp. br. p. 4) is obviously ineffective since Priorities Regulations No. 33 expressly provided that "Approval of a proposed sales price or rent should be considered merely as a limit upon the price or rent to be charged. It should not be considered as a

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purchasers. In the instant case, the District Court also took the view that additions and extras should not be considered. See R. 33, 34, 35, *et seq.*

In a purchaser's action under Section 7 (d), one district court required the deduction of the expense of additions. *Rheinberger* v. *Reiling*, 89 F. Supp. 598, 602 (D. Minn.). In a similar private action, another district court did not require such a credit. *Pruitt* v. *Litman*, 89 F. Supp. 705, 706 (E. D. Pa.). A State appellate court has expressly approved, in a private action under Section 7 (d), the rule of the *Duke* case, *supra*; *Elmers* v. *Shapiro*, 91 C. A. 2d 741, 755–6, 205 P. 2d 1052, 1060–1.

statement that the sales price or rent represents the value of the dwelling or the apartment for other purposes" (Govt's main br., p. 59). See also, *Keele* v. *Holt,* 171 F. 2d 480 (C. A. 5); *United States* v. *Austin, supra,* p. 19;[13] instant case, at R. 39.

Respectfully submitted.

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OCTOBER 1951.

[13] In the *Austin* case, Judge Chesnut decreed restitution in a case where there were substantial deficiencies in construction and some overceiling sales, even though (1) the builder had acted in full good faith, (2) the purchasers had inspected the houses and did not rely on the plans or specifications; (3) the actual sales prices accorded with V. A. appraisals, (4) the builder was inexperienced in building operations and the applicable administrative procedures, (5) suit was not brought until long after the Veterans' Housing Program had been discontinued, and (6) a Government official had orally and informally told the builder that he could depart from the plans and specifications.

A District Court of Appeal in California has allowed full recovery to a veteran-purchaser, in a private action under Section 7 (d), on similar facts. *Elmers* v. *Shapiro,* 91 C. A. 2d 741, 750 *et seq.*, 205 P. 2d 1052, 1058 *et seq.*

U. S. GOVERNMENT PRINTING OFFICE: 1951

No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA,
Petitioner

vs.

ROBERT FORTIER, et al

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR DEFENDANTS

Submitted jointly by

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Attorneys for Defendant Fortier

Green, Green, Romprey & Sullivan,
Attorneys for Defendants Marino

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 14

UNITED STATES OF AMERICA, PETITIONER

vs.

ROBERT FORTIER, et al

Defendants' Brief

INTRODUCTION

ON WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit to review a judgment affirming a judgment for the defendants ordered by the United States District Court for the District of New Hampshire, in a proceeding brought by the United States seeking to require the defendants to make restitution of part of the purchase price to the purchasers of two houses sold in November and December of 1947 for prices in excess of maximum sales prices established in 1946 under the Veterans' Emergency Housing Act of 1946, which act had been repealed prior to the sales in question.

The opinion of the Court of Appeals is reported at 185 F (2d) 608 (R. 54); the opinion of the District Court is reported at 89 F. Supp. 708 (R. 9).

Certiorari was granted by this Court on petition by the United States asserting in main that the decision below is in conflict with decisions of four *District Courts* and affects hundreds of other pending cases (Petition, pp. 6, 7. But see footnote 5 herein).

N. B. All record references are to page numbers of reprinted Transcript of Record.

STATEMENT OF CASE

Complaint by United States of America filed November 9, 1948, seeking mandatory injunctions compelling restitution to the purchasers of two houses of the difference between maximum sales prices set by the Federal Housing Administration and the prices charged and received on the sale of the houses on November 12, 1947 and December 4, 1947, the action being based upon Title III of the Second War Powers Act as amended, Regulation 33 promulgated thereunder, and Section 7(c) of the Veterans' Emergency Housing Act of 1946. (R. 1). The complaint was filed *within one year* after the sale in both instances.

The District Court for the District of New Hampshire denied defendants' Motions to Abate for lack of a proper party plaintiff (R. 49, 50), and denied defendants' Motions to Dismiss (R. 51-52), subject to defendants' exceptions.

The District Court likewise struck defendants' demand for a jury trial, on the Government's motion (R. 16), heard the case without a jury, and upon the Government's objection, excluded all evidence related to the equitable defenses raised by defendants' answers (R. 16, 18, 21, 31-36, 38, 39, 47, 48), subject to defendants' exceptions.

The District Court rendered its opinion, ordering judgment for the defendants, and from this judgment the plaintiff United States appealed to the Court of Appeals for the First Circuit, which affirmed the judgment (185 F (2d) 608). The District Court's judgment (R. 9-13) is based upon the premise that the express repeal of the material sections of the Veterans' Emergency Housing Act of 1946, by the Housing and Rent Act of 1947, on June 30, 1947, freed the defendants from any obligation to conform to the prior law with respect to maximum sales price limitations, in their sale of houses in November and December

of 1947, months after repeal. The Court of Appeals similarly disposed of the main issues (R. 54-59), Judge Woodbury further commenting upon whether the United States had any standing as a party plaintiff (R. 59).

STATEMENT OF FACTS

On August 21, 1946 the defendants applied for a residential construction permit under Priorities Regulation 33. They proposed to build two houses for proposed sale at $9,000 each. The application, as approved, authorized the construction of two five-room houses without garages or breezeways and established a maximum sales price of $8,350.00 on each unit so constructed. A project serial number and a preference rating HH was assigned upon the approval of the application (R. 9, 10, 14-15, 55).

The defendants had begun construction of the houses in July of 1946, and completed one house in August of 1947, the second house being completed in January of 1948 (R. 10, 15, 55). No materials used in the construction of these houses were shown to have been obtained by use of the HH preference rating obtained by their application (R. 55, 42, 43, 44). Windows costing $18 were shown to have been obtained, but they were not usable on these houses (R. 24, 25, Compare Exhibit 8 and Plans, Exhibit 5) and not shown to have been used in their construction (R. 25).

As constructed, additions were made. The first (Tasker) house included a garage, breezeway, staircase to the unfinished second floor, an extra window and lights in the attic, ceramic tile bathroom and other improvements. The second (Buckey) house included a garage, breezeway, outside entrance and stairway to the basement, three finished rooms on the second floor together with electrical fixtures, radiators, closets, windows and including a large dormer in the roof. (R. 10, 15, 21-22).

The first house was sold to a Captain Tasker, the sale price being $12,000. The second house was sold to a Major Buckey,

the sale price being $12,800.

Mr. Baker, one of the F.H.A. representatives, inspected the construction in progress, noted the additions being built, but made no complaint to the defendants (R. 22). The houses were inspected and appraised by an appraiser for the Veterans Administration as having value for loan purposes of $11,100 and $12,500 respectively before the respective sales, (See R. 39, 55).

Construction costs increased at least 20 to 25 per cent during the period of construction of the houses (R. 21, 36). Offers of proof that the defendants made no profit on the construction or sale of the houses, and in fact suffered financial loss were rejected. (R. 38-39, see 47-48).

The Second War Powers Act and the Veterans Emergency Housing Act of 1946 had been repealed prior to both sales.

ISSUES OF LAW PRESENTED[1]

I

Can the Housing Expediter continue in effect a regulation imposing maximum sales price restrictions upon housing sold after June 30, 1947, after Congress expressly repealed all statutory authority for the regulation on June 30, 1947? We submit that no executive agency can thus extend a repealed law.

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[1]This case came to the Circuit Court of Appeals on the Government's appeal alone, only because the defendants, not being aggrieved by the judgment below in their favor, could not cross-appeal under the rule of **Electrical Fittings Corp. v. Thomas & Betts Co.**, 307 US 241, 83 L. ed. 1263, 59 S. Ct. 860; **Harding v. Federal Nat'l Bank**, 31 F(2d) 914, and **Chapman v. King**, 154 F(2d) 460. The defendants, however, in an effort to prevent further harrassment by the Government, included in the record their own objections to the proceedings below and with leave of the Court argued those matters without cross-appeal under the rule of **Morley Constr. Co. v. Maryland Casualty Co.**, 300 U. S. 185, 81 L. ed. 593, 57 S. Ct. 325, rehearing denied 300 U. S. 687, 81 L. ed. 888 57 S. Ct. 505. With leave of the Supreme Court the defendants desire to similarly argue the issues here.

If our contention above is not accepted, in order that the defendants not be required to litigate endlessly upon this controversy, we reach two subsidiary issues which we argue, alternatively, assuming a cause of action is stated in the complaint.

II

The complaint should be abated for lack of a proper party plaintiff because brought at a time when the purchasers only had a right to bring suit, and, if not so abated:

III

In any further trial if the proceeding is an action for damages for breach of contract the defendants are entitled to a jury trial, and if it is a proceeding in equity the defendants are entitled to present their equitable defenses.

ARGUMENT

I

AN EXECUTIVE AGENCY CANNOT CONTINUE TO ENFORCE A REGULATION AFTER THE STATUTORY AUTHORITY FOR ITS PROMULGATION HAS BEEN REPEALED; THAT IS WHAT IS ATTEMPTED HERE, AND THE CIRCUIT COURT PROPERLY AFFIRMED THE DECISION OF THE DISTRICT COURT ORDERING JUDGMENT FOR THE DEFENDANTS.

The Government bases its complaint on an alleged violation of Priorities Regulation 33, originally promulgated under the

Second War Powers Act, and brings its action to enforce compliance with the Veterans' Emergency Housing Act of 1946.

The genesis, life and death of Priorities Regulation 33 is a long and confused story which has been commented on at length by the Federal Courts. *See, Woods* v. *Bauhan,* 84 F. Supp. 243, 244-248; *and U. S.* v. *Alterman,* 70 F. Supp. 734 (1947); see also, Commerce Clearing House's Reconversion Service at paragraph 31,021. Regulation 33 was of necessity based originally on Title III of the Second War Powers Act, and was adopted and continued in effect under the Veterans' Emergency Housing Act of 1946.

The regulation, at various times, covered various things. If we view it as it existed in August 1946 when the defendants procured their preference rating and authorization to build, it *then* covered *four* aspects of housing:

1. It *established rent ceilings* for new construction and conversion units.
2. It *established veterans' preference* procedures.
3. It *authorized maximum sales price regulation* for new construction built with priorities assistance.
4. It *established priorities and allocation* procedures to encourage production of scarce materials and to canalize their use in construction.

Let us consider which of the four phases of Regulation 33 were still in effect in November and December of 1947 when the sales involved in this case took place, by considering what statutes were then in effect on which Regulation 33 could be based, and by reviewing the de-control situation surrounding the passage of the Housing and Rent Act of 1947:

(a) The Second War Powers Act was repealed effective June 30, 1947.

In the "First Decontrol Act of 1947" (Laws of 80th Congress,

1st Session, Public Law 29), *approved March* 31, 1947, the Second War Powers Act was amended so that:

> "Except as otherwise provided by statute enacted during the first session of the Eightieth Congress on or before this section as amended takes effect, titles I, II, *III*, IV, V, VII and XIV of this Act . . . shall remain in effect only until March 31, 1947, except that such title *III* . . . shall remain in force until June 30, 1947, for the following purposes . . . "

The excepted purposes were entirely for *"allocations"* of specified critical materials not material in this case.

Thus ended, on March 31, 1947 (or on June 30, 1947) all authority for the enforcement of Regulation 33 which might be based on the Second War Powers Act, which in fact was the authority for its original promulgation prior to the enactment of the Veterans' Emergency Housing Act of 1946 (Laws of 79th Congress, Second Session, Public Law 388). The regulation must thereafter rest, if on any statutory authority, on Public Law 388.

(b) What the Veterans' Emergency Housing Act of 1946 had previously provided:

Public Law 388 (hereinafter called the 1946 Act) was a temporary statute and it included in its purposes the following objectives:

> " . . . To overcome the serious shortages and bottlenecks with respect to building materials, to expedite the production of such materials, to allocate them . . . to accelerate the production of houses with preference for Veterans of World War II *and at sales prices* or rentals *within their means.* * * * Accomplishment of these objectives will assist returning veterans to acquire housing *at fair prices,* . . . "(Section 1(a))

Section 1(b) provided that the Act and regulations issued under it terminate on December 31, 1947 "or upon the date specified in a concurrent resolution" of the two Houses of Congress declaring its provisions no longer necessary, "whichever date is the earlier".

Section 2(a) created the office of Housing Expediter, and subsequent subsections outlined his functions and powers.

Section 3(a) specifically gave the Expediter the power to *"by regulation or order establish maximum sales prices for such housing."* Section 3(b) specifically outlines the procedures by which this price shall be established and provides for the inclusion of a specific *"margin of profit"*, and Section 3(d) specifically gives the Expediter authority to issue regulations.

Section 4 deals with an entirely different group of powers—the powers to "by regulation or order *allocate or establish priorities for the delivery of . . . materials or facilities . . .*"

Section 5 provided that sales above maximum sales prices should be unlawful, that violations of regulations or orders should be unlawful and further provided:

> "Notwithstanding any termination of this Act as contemplated in Section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, *as to rights and liabilities incurred or offenses committed prior to such termination date,* for the purpose of sustaining any proper suit . . . with respect to any such right, liability, or offense."

Section 7(a) authorized compliance suits in an "appropriate" court by the Expediter. Only in criminal actions was the Attorney General authorized to bring suit in the name of the United States, under Section 7(b). The purchaser of a house at more than the maximum sales price was given a right to sue for restitution for one year by Section 7(d), but power was denied to

the Expediter "to bring an action on behalf of the United States within one year from the date of the violation if the buyer fails to bring an action" for such restitution, by Senate elimination of such a provision in the original bill. (*See* H. R. No. 2000, May 10, 1946, in Appendix 60 Stat 207).

Whether under that Act the defendants would have been liable *to the purchasers* of the houses in a suit properly instituted by them under 7(d) or to the Expediter in a suit properly instituted by him under 7(a) are not questions involved here. Neither of those possible parties are parties to this action. Hence our motion to abate.

(c) The Veterans' Emergency Housing Act of 1946 was repealed June 30, 1947:

The provisions of the 1946 Act set forth above were expressly repealed *on June* 30, 1947 by the Housing and Rent Act of 1947 (Laws of 80th Congress, First Session, Public Law 129). Section 1 of the 1947 Act provided:

> "Sections 1, 2(b) through 9, and Sections 11 and 13 of Public Law 388, Seventy-ninth Congress, *are hereby repealed . . . Provided*: That any allocations made or committed, or priorities granted for the delivery of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and *before the date of enactment of this Act*, with respect to Veterans of World War II, their immediate families, and others, *shall remain in full force and effect.*"

Title I of the 1947 Act thereafter establishes veterans preferences in the purchase and sale of housing, *but without reference to maximum sales prices* and without providing for any cause of action for noncompliance; Title II establishes rent controls with maximum rents, and provides for actions to recover excessive rent charges, etc., *but without reference to maximum sales prices.*

It seems clear from a reading of the two acts that the enactment of the 1947 act completely removed the power of the Expediter to enforce maximum sales price regulation after June 30, 1947. The only saving clause in the 1947 Act is that set forth above and which appears in Section 1. That clause protects allocations of materials made or committed or priorities granted *under Section* 4[2] of the 1946 Act for the production of housing for veterans. It does not continue in effect the regulations under which those allocations and priorities were granted.

As we view this clause, it was inserted to insure that critical materials already produced through priorities assistance and allocated to the veterans housing program not be diverted from that program. Under the new 1947 law veterans' preference provisions were still in effect. The only change accomplished by the 1947 Act affecting the situation involved in this case was to remove, by express legislation, the maximum sales price restrictions made possible by the 1946 Act.

If it had been the intention of the Congress to repeal the law but to leave the regulations promulgated under it in effect—including Regulation 33—this could have been done to a limited degree, as was done in other instances. Thus, the 1946 extension of the Emergency Price Control Act revived lapsed regulations in this apt language: " . . . all regulations, orders, price sched-

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[2]The Government brief in this Court presents a novel new theory for the first time: that price control on housing was not regulated under Section 3 which did authorize such control, but under Section 4 which did not. (See brief pages 11, 12, 15, 18-19, 20). Only the statements arguendo in the brief are cited as authority for this concept. We do not attempt to counter with such ex parte statements of facts unsupported by evidence. A comparison between the language of Section 3 and the pricing provisions of PR33 and HEPR 5, together with HEPO 1 (11 F. R. 9507) seem to us to indicate clearly that the Expediter relied upon his own statutory authority in Section 3 to control sales prices. However, both Sections 3 and 4 were repealed on June 30, 1947, so we would respectfully submit that the regulation of prices could not survive even under the Government's new argument.

ules and requirements . . . shall be in effect." *See, Cobleigh* v. *Woods,* 172 F(2d) 167, 168. Similarly, upon extension of the Sugar Control Act by the Sugar Control Extension Act of 1947, Congress expressly provided that "Every order, directive, rule or regulation is continued in force." *See, Bowen* v. *U. S.* 171 F(2d) 533, 534.

That is not what was done here. The saving clause in the Housing and Rent Act of 1947 does not even say that all regulations relating to priorities or allotment of materials survive—the allotments and priorities only are recognized and saved; the regulations themselves fell with the repeal of the Act on which they depended.

(d) The Housing Expediter interpreted the 1947 repeal precisely as the defendants now argue, at the time of the repeal in 1947.

We contend that after June 30, 1947 by virtue of the repeal of the 1946 Act and the enactment of the 1947 Act, the Housing Expediter had the power to enforce, by Regulation 33 or otherwise, only *two* of the *four* types of control previously enforced—rent control and veterans' preference regulation. Apparently the Expediter so viewed the situation *at that time*:

On July 3, 1947 the following amendment to subsection (g) of PR33 (upon which this action is based) and to subsection (h) was issued, effective as of June 30, 1947 (12 F. R. 4434):

"1 Add the following subsection at the end of paragraph (g):

(9) *Effect of Housing and Rent Act of* 1947.

"The requirements of this section with respect to the establishment or maintenance of *maximum rents do not apply* to any housing accommodations the construction of which is completed on or after February 1, 1947 (or to the additional housing accommodations created by conversion on or after that date) *unless such accommodations are being rented to a veteran of World War II or his immediate family who, on June* 30, 1947, *either*:

(i) *Occupied* such housing accommodations, or,

(ii) *Had a right to occupy* such accomodations, or,

anytime *on or after July* 1, 1947, *under any agreement whether written or oral.*

"In addition, the requirements of this section with respect to maximum rents shall not apply *after June* 30, 1947 to any housing accommodations which are not in a defense-rental area under rent control pursuant to Title II of the Housing and Rent Act of 1947.

"2. Add the following subparagraph at the end of paragraph (h):

(6) *Effect of Housing and Rent Act of* 1947.

"The veterans preference requirements of this section shall not apply to any housing accommodations which were completed after June 30, 1947. The veterans' preference requirements applicable to such accommodations are contained in the Veterans' Preference Regulation (12 FR 4265). For the purpose of this subparagraph, the time at which construction of housing accommodations shall be deemed to be "completed" shall be the date on which the dwelling is first suitable for occupancy and all utility and service connections have been made . . . "

"3. This amendment shall become effective on June 30, 1947, simultaneously with the approval by the President of the Housing and Rent Act of 1947."

At the same time a new Veterans' Preference Regulation was promulgated with this interesting introductory language (12 F. R. 4265):

"§ 813.1 *Veterans' Preference Regulation—*

(a) *What this section does.* This Section (Veterans' Preference Regulation) explains the preference given to

veterans and their families by the Housing and Rent Act of 1947 *in the sale* or rent *of housing accommodations completed between June* 30, 1947 *and March* 31, 1948. Among other things, it determines the manner in which such housing accommodations shall be publicly offered in good faith for sale or rent to veterans and their families.

"The veterans' Preference requirements for housing accommodations completed on or before June 30, 1947, *continue as provided in Priorities Regulation* 33, Housing Expediter Priorities Regulation 5 and the Housing Permit Regulation, whichever is applicable."

In these two amendments the Expediter was adapting his regulations to the 1947 Act, and, we contend, he amended the regulations only with respect to those parts of PR33 which were still effective under the 1947 Act. He expressly recognized that veterans' preference provisions of PR33 applied only to houses *completed* prior to June 30, 1947, the effective date of the repeal of the 1946 Act. He expressly recognized that the rental decontrol features of the 1947 Act took effect as of June 30, 1947. How then, can the United States take the position that the *repealed price control* features continued effective after June 30, 1947?

The Veterans' Preference Regulation issued under the 1947 Act provides a complete and detailed outline of the procedures to be followed in sales of houses completed after June 30, 1947. The same procedures as were provided in PR33 were re-promulgated *with deletion of the sales price restrictions*—consistently with the 1947 Act which deleted the statutory authority for price restrictions. These houses were subject to the new regulation, which was not violated: that regulation specifically states that PR33 applies only to houses *completed* prior to June 30, 1947.

"(e) The administrative situation when the 1947 Act was considered and passed clearly indicates that Congress did not intend the 1947 Act to be construed as the Government now argues.

When the Veterans' Emergency Housing Bill of 1946 was proposed, it was purely as a temporary measure, and it was proposed that it expire by its own terms on June 30, 1947. It was thus passed by the House, and the termination date was extended by the Senate to not later than December 31, 1947, unless sooner terminated by Congressional action, presumably on Mr. Wilson Wyatt's suggestion. *See, Hearings before a Subcommittee of the Committee on Banking and Currency, U. S. Senate,* 79th Congress, 2nd Session, on H. R. 4761, p. 100; *U. S. Code Congressional Service,* 79th Congress, 2nd Session, 1946, pp. 1178, 1182. As the record of the Senate hearings reveals, the primary purpose of the enactment was to stimulate production of finished building materials by premium payments to manufacturers, with allocation of raw materials to those manufacturers. Restrictions on the amount and types of building construction were already in effect, and were continued. Sales price restriction was a separate aspect of the bill.

When the 1947 bill, later to become the Housing and Rent Act of 1947, was proposed, Mr. Foley, National Housing Administrator, *part* of whose colloquy with Congressman Monroney is set forth in appellant's brief at pages 29 and 30 (But see, *Schwegmann Bros.* v. *Calvert Distillers,* 95 L. ed. Adv. 684, 688, 689, 691) was *not* charged with administration of maximum sales price regulation—Mr. Frank Creedon, as Housing Expediter, *was.* Since Mr. Creedon was the chief administrative proponent of the new legislation, we set forth the following testimony of Mr. Creedon, given on March 18, 1947, at *Hearings before the Committee on Banking and Currency, House of Representatives,* 80th Congress, 1st Session, 1947, on H. R. 2547 (italics added):

"My first actions as Housing Expediter were to remove those controls which no longer served an effective purpose * * * *all price ceilings on houses to be built in 1947 were dropped.*" (p. 36) * * *

"As you know, I came into the program on December 15, [1946] *after building materials were decontrolled*" (p. 43). * * * .

"Mr. McMillen: You are fixing the sale price of these houses that are being built, are you not?

Mr. Creedon: *No, we cut all sales prices loose on December* 24.

Mr. Gamble: The only limitation now is the number of square footage; is that right?" (p. 51) * * *

Mr. Creedon: " * * * Of course, *all priorities on building materials*—I mean the issuance of them—*stopped on December* 24, 1946. Then, if the Government had a contract, so to speak, between those builders, the Government said, "we will give you a priority," and we feel that we have to carry out our end of that contract, so *we have given them until March* 31, [1947], *the end of this month, to extend those priorities, and then there will not be any more.*

Mr. Cole: Then the *priority system is practically eliminated at the present time?*

Mr. Creedon: *It was eliminated on December* 24, 1946, but we had to keep our end of the bargain and gave them a reasonable time to use them. We set March 31, *and if they do not get them in by March* 31, *then, they are valueless.*" (p. 55) * * *

"In the case of sale housing . . . You do not have to submit any plans, so far as the government is concerned, and you just sign a statement to the effect that your house will not exceed 1,500 square feet of floor space; that

you will limit it to one bathroom, that the house is for year-round occupancy, and that in the sale you will conform to veterans' preference." (p. 62) * * *

Mr. Banta: "[You can hear plenty of bad news on] the effect which *allocation of materials* had, which, of course, *you now say has been discontinued entirely, the priority allocation.*

Mr. Creedon: Yes, the priorities ceased December 24, *but we are continuing with the raw materials.* (p. 66)

Mr. Banta: Now to what extent is any of the scarce building material now controlled? Is there price control on it? Soil pipe, for instance?

Mr. Creedon: No, there is no price control." (p. 66)

* * *

Mr. Banta: *"There is no allocation of the finished product,* though, to dealers?

Mr. Creedon: *No, sir."* (p. 66) * * *

Mr. Banta: *"There are no price controls in effect regarding any building or construction material now?*

Mr. Creedon: *No, sir."* (p. 67)

Here is the picture Congress had when it passed the Housing and Rent Act of 1947:

(1) Price control of building materials had ended on November 9, 1946—see Hearings, above cited, at page 608.

(2) Maximum sales price control of new housing had been abandoned by the executive branch of government on December 24, 1946, since it was manifestly impossible to control prices of finished houses, when the materials going into them were being sold on an unrestricted market.

(3) The priorities system, as it related to building contractors such as the defendants, had been abandoned on December 24,

1946, except that priorities granted prior to that date were supposed to have been effective until March 31, 1947.

(4) After March 31, 1947 priorities previously granted were "valueless," and housing uncompleted on that date was to be completed without priority assistance, the materials necessary being available, if at all, in an uncontrolled market.[3]

After hearing this testimony, and further testimony that allocation and priority authority with respect *only* to production of finished building materials from raw materials was still necessary (Hearings, pp. 38,-56-62), the House voted to repeal the whole of the 1946 Act, with the provision in Section I of the new 1947 Act protecting only allocations and priorities previously made. The Senate amended the bill to temporarily continue the office of Housing Expediter, but only for the purpose of administering rent control and to liquidate the existing obligations of the Government with respect to market guarantee agreements and premium payment regulations. *U. S. Code Congressional Service,* 80th Congress, 1st Session 1947, p. 1237 et seq.

We say this situation indicates that Congress intentionally and knowingly omitted any reference to maximum price control over new housing in the 1947 Act. "It is fair to say that in all this, Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected." *Universal Camera Corp.* v. *N.L.R.B.,* 95 L. ed. Adv. 305, 312.

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[3]The Government, by footnote at page 21 of its brief, cites references indicating that priorities could be extended further, but only to June 30, 1947, when the 1946 Act expired. This reinforces our argument that after that latter date, no continuation of control was then contemplated. As the Court below pointed out (R. 55) priorities had become valueless after prices of materials were decontrolled on November 9, 1946, before construction of these houses was substantially started.

(f) The case law.

The better reasoned cases do not support the Government's position that enforcement of this statute can be continued beyond its express repeal; the District Court cases which reach the result contended for by the appellant are bad law and should not be approved here. The several cases relied upon by the appellant Government may be divided into the following groupings:

U. S. v. *Duke Bldg. Corp.*, 79 F. Supp. 681; *U. S.* v. *Elade Realty Corp.*, 157 F(2d) 979; *Cantrell* v. *Golden Crest Homes, Inc.*, 77 N. Y. S. (2d) 519 (Queens City Ct.-1948); *Keele* v. *U. S. and Woods*, 178(2d) 766; and *U. S.* v. *Carter*, 171 F(2d) 530, are all cases involving violations of the Veterans' Emergency Housing Act of 1946, or prior statutes, by sales of new housing at prices in excess of maximum sales prices previously set, the sales taking place while the 1946 Act was still in full force and effect—i.e., prior to June 30, 1947—but the litigation beginning thereafter. None are authority for the appellant's position. Those cases, as said in the *Carter* case, present a question, "whether the Housing and Rent Act of 1947 . . . took away the remedy whereby the Government could maintain an action to secure *restitution of overcharges that had been made while the* 1946 *Act was in full effect*" and generally hold that "*penalties and liabilities accruing while an act was in effect* may be enforced after its repeal." We do not argue against the result reached in these cases, in view of the express statutory language contained in 1 U. S. C. 109. See, *Talbot* v. *Woods*, 164 F(2d) 493; *Ebeling* v. *Woods*, 175 F(2d) 242.

Katz v. Litman, 89 F. Supp. 706; and *Pruitt* v. *Litman*, 89 F. Supp. 705, present borderline cases. In these cases some express contractual obligation existed between the buyer and seller *before* repeal of the 1946 Act, the actual conveyance (or sale) was consumated *after* repeal, and the buyer (not the Government) was complaining against the seller for violation of maximum sales

price restrictions. Without any detailed consideration of the law, and without any citation of pursuasive authority, the District Court for the Eastern Division of Pennsylvania found liability to exist.[4]

We disagree with the result reached in these cases. While it may be arguable that the contractual arrangements entered into while the 1946 Act was effective created a "liability" existing prior to the termination of the act, that conclusion does not convert an executory contract to sell into a *"sale"*, which is the act prohibited by the regulations and which is the only act giving rise to a cause of action by the purchaser under Section 7(d) of the 1946 Act. The Court essentially holds that by agreeing to do a prohibited act a "liability" *to do* the act, rather than to refrain from doing it, is created. With more reason it might be held that whomever entered into such an executory contract had violated Section 5 which made it unlawful to "solicit, attempt, offer or agree to make any such sale." Punishment for such a violation would presumably be the sanctions of Section 7(a) and (b), but not Section 7(d) which gave a cause of action for "selling", and not for agreeing to sell.

These cases, however, are distinguishable from the instant case and are properly classified, in our opinion, with the prior group of cases where violations (sales) were properly held to have taken place while the 1946 Act was still in effect.

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[4]The facts of **Pruitt v. Litman** are of interest:

Defendants procured priority assistance on May 22, 1946, and a maximum sales price of $9,200 was established. On June 16, 1947 defendant signed an agreement to sell for $10,750, and accepted earnest money. On August 1, 1947 payment was made and a deed passed. Plaintiff lived in the premises until July of 1948, whereupon she sold the premises for $11,500 making a profit of $750. She thereupon sued Litman and received a judgment of $1,550 plus counsel fee of $200, making a total net paper profit of $2,500 on the transaction, in addition to occupying the new house for almost a year. The decision does not indicate whether the judgment was granted in the name of equity.

Appellant cites and relies on *Nesseth* v. *Creedon,* 80 F. Supp. 269, a case not in point and not decided upon any ground applicable here. That case involved a maximum price increase asked for *before repeal* of the 1946 Act and is governed by the *Talbot* case rule; contracts to sell were in existence *prior to repeal,* as in the *Katz* and *Pruitt* cases, but were not the basis of decision; no ruling is made in the Nesseth case on the question presented here—whether the 1947 Act terminated maximum price restrictions under PR33—since that Regulation was not involved, and the decision rests upon a ruling that the plaintiffs were not entitled to raise the question.

Finally, appellant cites and relies on *Rheinberger* v. *Reiling,* 89 F. Supp. 598, a District Court case apparently on all fours with the instant case, and which, *in a suit instituted within the statutory time limitation by the purchaser* of the house, sustains the theory of liability upon which the government relies here. The case is unquestionably contra to the opinion below in this case. We submit, however, that the opinion in the instant case is proper, and that the *Reiling* case rule should not be approved.

In the *Reiling* case, plaintiff, a practicing lawyer, signed an earnest money contract to purchase a house for $11,700 on November 28, 1947. The house had been covered by a maximum sales price set on May 13, 1946, under PR33 at $8,400. On December 4, 1947, defendant applied for a maximum sales price increase from $8,400 to $11,700. This request was never acted upon. Plaintiff took possession on January 3, 1948 and title closing was on January 20, 1948. Prior to completion of this trade, the plaintiff, in December of 1947 demanded that the property be conveyed to him at the maximum sales price ($8,400), whereupon defendant offered to pay back his earnest money and call the deal off. The plaintiff refused, and said he wanted the house.

Here, the inequities of the "agreement to sell equals a sale"

theory came into full flower. The plaintiff *insisted* that the defendant was obligated to convey to him, because of an illegal contract. He refused to permit the defendant to rescind the illegal contract. And, when the contract was performed, he sued for a monetary recovery based upon the illegality which he previously insisted did not vitiate the contract! The District Court in Minnesota, in the name of equity, granted a judgment permitting the plaintiff to recover.

We say that this decision is both bad law and bad equity.

In essence, the Government's position is that language contained in Sections 1(b), 3, and 5 of the 1946 Act, *although those sections were expressly repealed by Section 1 of the 1947 Act,* remained the law of the land until the Housing Expediter, in his greater wisdom, repealed them. The Solicitor-General so argues at pages 11-12 of its Brief. He does not similarly argue, although implicit in his case, that Section 7 of the 1946 Act likewise survived its express repeal.

We submit that this Court should reject this fallacious argument and we commend to the Court's attention the reasoning of Judge Delehant of the District Court of Nebraska in *Creedon* v. *Stratton,* 74 F. Supp. 170, 180, 181-182, and the statement of the District Court in *Woods* v. *Griffin,* 90 F. Supp. 1017 at 1019:

> "An administrator cannot regulate matters expressly taken or removed by Congress from his supervision. As was said by the Court in *Prince* v. *Davis,* City Ct. 87 N. Y. S. (2d) 600 on page 604: '(4, 5) No one disputes the authority of the Housing Expediter to issue the necessary regulations to effectuate the statute, but clearly such regulations can only relate to property which is subject to control by Act of Congress. The Housing Expediter may not legislate and he may not enact regulations so as to

bring within administrative action that which Congress has chosen to specifically exempt." (1019)

See also, Talbot v. *Woods,* (ECA-1947) 164 F(2d) 493; *Standard Kosher Poultry, Inc.* v. *Clark,* E. C. A. 1947, 163 F(2d) 430; *compare, Herman* v. *Woods,* (E. C. A. 1949) 175 F(2d) 781, 786; *Woods* v. *Gochnour,* 81 F. Supp. 457 (E. D. Wash., 1948).

As this Court said in *United States* v. *Moore,* 95 L. ed. Adv. 431 at 434, referring to comparable provisions in the 1947 Act, Section 5 of the 1946 Act "provides for the survival of rights and liabilities incurred *prior to the expiration of the title* on either the date specified by Congress in the Act or such date as . . . Congress might later determine." Here Congress later determined to and did repeal the title upon which this proceeding is based, prior to the occurrence of the act relied upon as violations. Neither the "violations" nor suit preceded this express repeal.

We urge upon this Court the decisions below in this case, *U. S.* v. *Fortier,* 89 F. Supp. 708, aff'd 185 F(2d) 608; *U. S.* v. *Duvarney,* (D. C. N. H. unreported), aff'd 185 F(2d) 612, petition for certiorari pending in No. 15 this Court; *Sedivy* v. *Superior Home Builders,* 188 F(2d) 729 (CCA-7); and *U. S.* v. *C. B. S. Construction Co.,* 93 F. Supp. 664, appeal pending, CCA5, No. 13,455, as sound law. As Chief Judge Magruder, after discussing the 1946 and 1947 Housing Acts said in this case at 185 F(2d) 608:

> "It seems clear that the United States cannot base its present suit on the last sentence of Section 5 of the Veterans' Emergency Housing Act, which was thus repealed on June 30, 1947, prior to the sales of the houses in question. * * * Having repealed the Veterans' Emergency Housing Act of 1946, it is significant that Congress addressed itself specifically to the problem of veterans' housing, in the Housing and Rent Act of 1947. * * * If Congress had

further intended to keep in force for the future any maximum selling prices which had theretofore been imposed under Priorities Regulation 33, it would have been natural to express such intent in the proviso to Section 1(a) which repealed the Veterans' Emergency Housing Act of 1946, the statutory basis for Priorities Regulation 33".

II

THE COMPLAINT SHOULD BE ABATED FOR WANT OF A PROPER PARTY PLAINTIFF.

For the purpose only of this argument we assume that a cause of action is shown by the allegations of the complaint, and that those allegations are supported by evidence. Is the United States a proper party plaintiff?

In the *Cantrell, Katz, Pruitt,* and *Rheinberger* cases, the plaintiffs were the "persons who" bought the houses involved, bringing their action under Section 7(d) of the 1946 Act, "within one year from the date of the occurrence of the violation," extended by Section 109 of Titles 1, U. S. Code.

There are many other cases in which, after the expiration of the one year limitation on the purchaser's action and while he was enforcing the provisions of an existing statute or seeking to enforce liabilities incurred while the statute *was* previously in effect, the Housing Expediter (or the United States under Executive Order No. 9842) was allowed to maintain an *equitable* action seeking restitution as "an other order" which might be entered upon *his* application under Section 7(a) of the 1946 Act, under the rationale of *Porter* v. *Warner Holding Company,* 328 US 395, 66 S. Ct. 1086, 1091, 90 L. ed. 1332. See, *United States* v. *Allied Oil Company,* 95 L. ed. Adv. 482; *United States* v. *Moore,* 95 L. ed. Adv. 431 and cases cited at 434.

Here, without excuse that the action is necessary or appropriate to enforce past, present, or future compliance with any existing

law of the United States, the United States, not being a party in interest, brings suit for the sole benefit of Messrs. Tasker and Buckey. The purpose of the action as set forth in paragraph 4 of the complaint (R. 1) is illusory and fictitious, as the opening statement (R. 16, 17) clearly indicates.

Under Section 7 of the Veterans' Emergency Housing Act of 1946 Congress expressly provided that

(a) The Housing Expediter may institute compliance proceedings seeking injunctive relief "or other order" against sellers of houses at above maximum prices;

(b) The United States may institute criminal proceedings to punish wilful violations;

(c) The purchaser of a house may, *within one year of the date of sale,* bring an action to recover any excess over a maximum sales price, plus attorneys fees and costs.

The Act as originally passed by the House, would have permitted the Expediter in the name of the United States to sue for restitution within a year if the purchaser failed to do so (as was done here by the U. S. Attorney), but this provision was eliminated by a Senate amendment accepted by the committee of conference report on the bill. See H. R. 2000, May 10, 1946, *supra.* Nevertheless the U. S. Attorney brings such an action asking only that restitution be ordered paid to third parties.

Mr. Justice Fuller, in *Curtner* v. *United States,* 149 US 662, 37 L. ed. 890, states the general law which prevents the United States from thus engaging in barratry and maintenance as follows at 149 US 672, quoting from *United States* v. *San Jacinto Tin Co.,* 125 US 273, 285. 31 L. ed. 747, 751:

> "' * * * if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any

obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

'In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail.'"

We suggest that a close analogy to the present case may be found in *United States* v. *Waller*, 243 US 452, 61 L. ed. 843, wherein the Government paternally instituted suit for certain Chippewa Indians to secure cancellation of deeds obtained from them by fraud, after Congress had emancipated those Indians. Of course, Veterans of World War II were not specifically made wards of the Federal Government by the Veterans' Emergency Housing Act of 1946—but the same paternalistic concern is here shown. In the *Waller* case the court recognized the right of the United States to sue as guardian to protect the rights of its Indian wards, but also gave effect to the emancipation enactment, saying (243 US 462):

"In this view of the legislation and the particular act in question, we are unable to find any authority in the United States to maintain this suit in behalf of the Indians named."

See also, LaMotte v. *United States*, 254 U. S. 570, 575, 65 L. ed. 410, 412, and cases cited, in which the rationale that permits the United States to maintain suit for those in a "state of tribal dependence" is further commented upon and applied.

In *United States* v. *American Bell Telephone Co.*, 167 US 224, 42 L. ed. 144, the Court recognized the power of the United States to maintain suit in which it had no pecuniary or proprietary interest in limited situations which may appear more akin to the instant case and that decision at 167 US 264-267 may give some meagre support to the Government's position on the *general* law applicable here, except that here, as in the *Bell Telephone* case, the facts do not support the theory. The *Bell Telephone* case decision goes on however, at 167 US 267-269 to point out that even if such a general power to sue "in the discharge of its obligation to protect the public" or because "it owes a duty to other [citizens] to secure to them the full enjoyment of . . . rights which has conferred," does exist, still the failure of Congress expressly to provide statutory authority for the suit is pertinent—

> " . . . the failure so to do may be evidence that Congress thought the government ought not to interfere, and because it believed it had made ample provision for securing the rights of all without the interference of the government."

The Seventh Circuit, in *United States* v. *Allied Oil Corp.*, 183 F(2d) 453, applied this reasoning in affirming the dismissal of a suit brought under the identical provisions of the Emergency Price Control Act of 1942 after the United States was substituted as plaintiff. This Court's reversal of the *Allied Oil* case in 95 L.ed. Adv. 482 *assumes* the existence of the public right or interest being furthered by the suit, and upon such an assumption the decision may be proper. In the instant case, however, no such assumption can validly be entertained: the act complained of was violative of no law and no policy of the United States existing at the time of its occurrence.

See also Bowles v. *Wilke*, 175 F(2d) 35 and cases cited therein (CCA 7), cert. denied 338 US 861, 70 S. Ct. 104; *Defense Supplies Corp. and RFC* v. *Laurence Warehouse*, 336 U. S. 631; 69 S. Ct. 762.

We would invite to the Court's attention that the *Warner Holding Company* case rule, as originally announced, did not undertake to rule that the United States could seek to compel restitution in a proceeding entirely divorced from its obligation to enforce compliance with provisions of its laws. Properly interpreted, that decision accords with the general rule as announced in *United States* v. *Beebe,* 127 U. S. 338, approved in the *Curtner* case, *supra.* Thus such a suit, *after* the purchaser's right of action is barred, while violations by the defendant continue, and while the law remains in effect, may be reasonably calculated to induce future compliance by the defendant and also by others to whom the defendant becomes an example as held in *U. S.* v. *Moore,* 95 L.ed. Adv. 432. Where the defendant is no longer engaged in activities subject to control, and is therefore not currently violating the law (which is the situation here), and when no one else is subject to the law because the law is no longer in effect (which is the situation here), the proceeding is not at all related to compliance. It then becomes either a proceeding to exact a penalty for supposed past violation of law (*Bowles* v. *Barde Steel Co.* 177 Or. 442, 164 P(2d) 692, 162 ALR 328), or a bald attempt to litigate for the sole benefit of third parties in matters concerning which the United States has no interest, obligation, or duty. Since the Government denies an intention to penalize, it admits its maintenance. Since the purchasers *still had a right to sue* when this complaint was filed for them by the Government, there can be no doubt that this suit by the Government is likewise unnecessary, if viewed as protective of the purchasers' possible rights.

The complaint should be abated for want of a proper party plaintiff. Until the expiration of one year from the date of sale the sole right to seek restitution was given by Section 7(d) of the 1946 Act not to the United States, but to the purchasers, who are the real parties in interest here. *Woods* v. *Pable,* 86 F. Supp. 464. *See also,* dissent in *Woods* v. *Richman,* 174 F(2d) 614, 616.

III

THE COMPLAINT STATES EITHER A LEGAL ACTION FOR DAMAGES FOR BREACH OF CONTRACT, IN WHICH CASE THE DEFENDANTS ARE ENTITLED TO A TRIAL BY JURY, OR SETS FORTH AN EQUITABLE CAUSE FOR RESTITUTION, IN WHICH CASE THE DEFENDANTS ARE ENTITLED TO PRESENT THEIR EQUITABLE DEFENSES.

a. The contract theory.

The Government, throughout its brief, discusses the existence of a contract between itself and the defendants. The argument is that the Government promised to give the defendants assistance in their construction effort *and gave that assistance*, and in return the defendants promised to sell their houses at not more than a fixed maximum price. Let us assume that this theory is sound.

As Expediter Creedon's testimony in the public hearings before Congress on the 1947 Act reveals, there was *a failure of consideration* on the part of the Government. The Government agreed to grant priorities assistance which would make it possible for the defendants to get the materials necessary to complete the houses, and at prices controlled as were the sales prices. Prices were decontrolled on November 8, 1946; priorities were abandoned on December 24; existing priorities were made "valueless" on March 31, 1947. These houses were not then complete and the defendants, by the Government's wilful breach of contract, were forced to complete, if at all, in an uncontrolled market in which prices rose 25% or more.

Moreover, *the "consideration"* given by the Government *was in fact valueless and illusory when given*, and gave no assistance. We refer to the evidence in the transcript which indicates that the "hunting license" was unnecessary and unhelpful, in fact, as the defendants and the witness Swanburg indicated.

As a result of this illusory promise by the Government, and the Government's later wilful breach of the "contract," the defendants incurred great expense, and more than they were led to believe would be involved by the "representations" of the Government contained in Exhibits 6 and 7. There can be no doubt, *if* there is a contract involved here which supports the Government's claim, that these defendants have a right of counterclaim against the Government for damages resulting to them from the Government's withdrawing its "assistance" before these houses were completed, and a sufficient defense to the Government's claim based on their later "breach."

And, if this is an action for damages for breach of contract, the defendants are entitled to a trial by jury, as demanded. (See, *U. S.* v. *Moore,* 95 L. ed. Adv. 431, at 434) These propositions, are, we believe, sufficiently fundamental to require no citation of authority.

If, on the other hand, this is a proceeding to compel specific performance of this contract, the same contract defenses, and other equitable defenses discussed below are relevant and admissible.

We submit this analysis of the contract theory to demonstrate its fundamental unsoundness. No action lies against the Government for amendment of law or regulation; no action is maintainable by the Government on a contract theory to punish violation of regulatory statutes, as the lower courts in this case properly ruled. The contract theory is not applicable.

b. The restitution theory:

Plaintiff's case, if there is any basis for it at all, rests upon the holding in *Porter* v. *Warner Holding Company,* 328 US 395, 66 S. Ct. 1006, 90 L. ed. 1332. In that case rent gouging under OPA

was involved, the acts of the defendant extending over several months. The Administrator sought an injunction against further violations *while the act was still in force*, and also sought to compel restitution under *s.* 205(a) of that Act, which is identical in language to the repealed section 7(a) of the Veterans' Emergency Housing Act of 1946 relied on here. The Supreme Court held that such a suit might be maintained and a decree might properly be entered, "compelling one to disgorge profits . . . acquired in violation of the" Act. But the Supreme Court squarely held that such a decree rests *on the equity powers of the court*, not on the *requirements* of the statue:

> "But where, as here, *the equitable jurisdiction* of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . . The problem of formulating these orders has been left to the judicial process of *adapting appropriate equitable remedies to specific situations.* * * * *The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges* . . . while giving necessary respect to the private interests involved. * * *
>
> "It follows that the District Court erred in declining, for jurisdictional reasons, to consider *whether* a restitution order was *necessary* or *proper* under the circumstances here present. *The case must therefore be remanded to that court so that it may exercise the discretion that belongs to it.*" (90 L. ed. 1338-40)

The District Courts have repeatedly recognized that the equitable power to compel restitution, as outlined in the *Warner Holding Company* case, is to be exercised to do equity, not to punish. Thus Judge Foley of the Northern District of New York refused a restraining order where there was no probability of future vio-

lations, and reduced the amount ordered repaid in restitution from the amount of the rent overcharges, $140, to $48 in *Woods* v. *Barnes*, 84 F. Supp. 155 (1949).

Similarly, in *Woods* v. *Kooker*, 83 F. Supp. 362, Judge Miller refused to decree any restitution at all, although a maximum rent violation of several hundred dollars was established. See also, *Woods* v. *Richman*, 174 F(2d) 614; *Woods* v. *Darby*, 84 F. Supp. 719, 720; *Woods* v. *Minucci*, 84 F. Supp. 535, 536; *Woods* v. *Baker*, 84 F. Supp. 339; *Woods* v. *Benson Hotel Corp.*, 81 F. Supp. 46.

While it is true that restitution has been used as "an other order" in price control and rent cases generally, we desire to point out that it is inappropriate as an *equitable* remedy in the case of sale of housing under the circumstances of this case. As is quite often stated in the cases, the design of restitution is to put the parties, as nearly as may be, in the *status quo ante*. Restitution of the excess over the maximum price to the purchaser, who is allowed to retain title to the house, does not accomplish this, when the *value* of the house is in excess of the maximum price established.

The inappropriateness of the remedy is most apparent in the *Pruitt* case discussed above. The purchaser *was not injured*—she *re-sold at a profit*, and also received a windfall from the court. This result is justifiable, if at all, not in the name of equity, but *as a penalty*, imposed by the Court for violation of a statute. Yet the *penalty* prescribed by the statute is not designed to be granted as largesse to the purchaser, but is a fine for the government whose law is violated.

Complete relief by restitution would require that the house be reconveyed to the seller, and the purchase price be restored in full to the buyer, with an adjustment for the rental benefits received by the buyer through occupancy of the premises in the

interim. This the Government does not seek, nor do the real parties in interest desire it. The comparable *Rheinberger* case, relied upon by the Government, shows a purchaser *refusing* complete relief, in order to get the penalty windfall.

c. Equity requires that no decree of restitution issue in this case.

We review certain of the facts as shown without contradiction in the record:

The defendants did not make or receive any profit on the construction and sale of these houses; on the contrary they suffered a financial loss, the extent and reason for which was excluded subject to exception. (R. 29, 38-39).

The FHA officials who approved the defendants' application set a maximum sales price of $8,350 *upon each 5-room house, without any garage or breezeway.* Mr. Baker inspected construction, found it satisfactory, noted *additions* being built not required nor prohibited by the FHA, and did not complain. Further, under regulations effective during part of the construction period price increase would have been allowed because of increases in building costs and because of additional accommodations being built, and Mr. Baker testified, in the plaintiff's case, that these defendants would have been entitled to price increases with relation to these houses for both reasons. An increase in building costs from an index figure of 410 to 485—more than 20%—was shown to have taken place while the houses were under construction; evidence of the actual building costs and the actual value of the additions and of the completed units was excluded subject to exception. (R. 29-39, 40, 21-22).

The real parties in interest, Captain Tasker and Major Buckey have received the full benefit of the additions, and for their money received not only the 5-room houses covered by the $8,350 maximum sales price, but also now own garages, breezeways, staircases, extra windows, and in Buckey's case, three extra rooms

and an extra outside entrance to the basement.

No evidence was introduced tending in any way to show that either Tasker or Buckey received any less than their money's worth; no evidence was submitted to show that the houses cannot be re-sold by them for at least what they paid for them.

No evidence was introduced showing that any profiteering was involved in these sales, or that sales at these prices were inflationary of real estate values—on the contrary, evidence to the effect that the sales were deflationary, in that the sales were below cost, was excluded subject to exception.

No credit is offered to the defendants for the excess value represented by the additions, the plaintiff on the other hand seeks recovery for several items claimed not to have been completed—no credit is given for a $1,500.00 garage, but penalty for failure to provide two laundry trays claimed to be worth $35.00 is asked.

On these facts, where does justice and equity lie?

We submit that it does not require that the present owners of these houses be given a windfall of several thousand dollars and be permitted to retain the houses with the additions and added value represented by them. There is no evidence that they have been financially damaged.

We submit that equity does not require that the defendants be penalized for innocent failure to seek warranted increases in maximum prices after repeal of the law which required their compliance with those prices.

We submit that equity does not require penalties to be imposed in 1951 to enforce compliance of a statute which was repealed in June of 1947.

Nothing will be accomplished by granting the prayer of the petition other than to penalize the defendants for the innocent sale of houses below cost, and cause the windfall enrichment of Messrs. Tasker and Buckey. No policy of the United States is

furthered, since the controls sought to be enforced have long since departed.[5]

Equity requires that no order of restitution be issued.

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[5]The Solicitor General, in March of 1951, in his Petition for a Writ of Certiorari, represented to this Court as the main Reason for Granting the Writ, that "There are about one hundred and fifty suits by the United States involving claims of some 1700 veterans, as well as an undetermined number of suits by veterans on their own behalf, pending in other courts in which the question decided by the court below is at issue. In addition, the Housing Expediter's Office is processing the claims of about two hundred veterans and expects that numerous other suits will be brought." (Petition, p. 7) He concludes: " . . . the interpretation of the court below cuts off relief from hundreds of veterans who paid over-ceiling prices without receiving concomitant increases in value." (Petition, p. 13, see Brief, p. 43).

Because these assertions appeared erroneous to counsel for defendants, the Solicitor was requested to supply detailed information upon which these representations were made. On August 10, 1951, after some exchange of correspondence, the Solicitor replied, in part, as follows:

". . . Information supplied us by the Housing Expediter, upon which we relied, apparently overstated somewhat the number of pending cases. We are now informed that, as of March 1, 1951, the Housing Expediter, had submitted to the United States Attorneys at least 106 cases in which the files definitely indicate that sales after June 30, 1947, are involved. • • • Of the 106 cases in which we have definite information, 60 had been filed on March 1, 1951.

"We are enclosing a list of those cases containing the names of the defendants, the court in which each case was pending, and the docket number where available."

Counsel for the defendants herein have endeavored to ascertain in how many of the 58 cases listed in addition to the Fortier and Duvarney cases, the issue of the Fortier case, namely, sales after June 30, 1947, is actually involved.

At least nineteen of these cases have been either settled or dismissed, the issue of the Fortier case was not at all involved in four of the cases and only incidentally involved in four of the other cases.

Only thirty-two of the listed cases are currently pending, but three of these cases do not involve sales after June 30, 1947 in any way. In all but two of the remaining cases the bulk of the alleged violations are sales prior to June 30, with a few sales after June 30, 1947 added. In one of these cases the Government "confessed" a motion to dismiss the post-June 30 charges; in at least two others the District Courts have dismissed such charges over the Government's objections.

CONCLUSION

It is well near impossible to present authorities precisely in point upon the main issue in this case, since there appear to be no decided cases in which the government has attempted to enforce statutes after their express repeal. That fact alone, we submit, is indicative of the flagrant abuse of process which we feel is

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Four of the cases listed by the Solicitor General could not be identified by Clerks of the District Courts in which they are supposedly pending. Three cases listed are criminal indictments.

This information is offered here, not merely to indicate that the Solicitor inadvertantly overstated the extent of the importance of this case on pending litigation, in advocating granting of this writ, but to attempt to point up the practical necessity of this Court's affirming the result below in order that vexatious litigation which serves no useful purpose be put at an end. In March of 1951, more than three years after the date upon which the Government contends the 1946 Housing Act and its regulations expired, and nearly four years after Congress expressly repealed the statute, the Housing Expediter and the Department of Justice are still processing proposed future law suits for sales of housing after the control act was repealed. These suits will perforce be brought more than two years after the statutory right of the purchaser to sue for his damages has expired, but for the sole purpose of securing restitution to him. This smacks of barratry.

Counsel in U. S. v. Sisk, (Civil 1064, D. C., M. D., Tenn), a case involving three sales, writes:

"In December of 1946 I represented a group of construction contractors in a hearing before the Special Committee of the United States Senate to study and survey problems of small business enterprises. . . . The hearings were begun on December 11 and I have in my files a stenographic copy of the same printed by [GPO], Washington, 1947 and bearing No. 68053. At 2:15 p. m. on Wednesday, December 18, 1946, Mr. Frank R. Creedon, Housing Expediter for the Government, had appeared and testified on page 11272 that the fixing of price ceilings had been eliminated on housing, [quoting testimony]

"Of course, I know that this doesn't have the effect of law . . . but many of my clients who were present or who heard of it, believed what the Housing Expediter had to say, that price ceilings were eliminated. In fact, it was during this hearing that it was reported that such ceilings had been eliminated by executive order."

Nevertheless, today the U. S. Attorney, not the Expediter, brings suit, and, counsel reports, objects to buyer and seller settling their dispute out of court!

represented by this case. When Congress speaks and strips an executive agency of price control powers, as was done here, we submit that it is highly improper for the Attorney-General in the name of the United States of America or the Solicitor General to thereafter harass, inconvenience, and cause expense to citizens in effort to continue to enforce penalties the authority for the imposition of which has expired. *See Joint Anti-Fascist Refugee Committee* v. *McGrath*, 95 L. ed. Adv. 556 at 567, 589.

We respectfully ask that this Court affirm the judgment of the court below or instruct the Court of Appeals to order the District Court to abate this complaint, or, in the alternative if the case is maintainable, that the Circuit Court be instructed that under the circumstances of this case as apparent by the evidence admitted and offers of proof excluded, whether any decree of restitution should issue lies in the sound equitable discretion of the District Court, and that no decree should issue unless warranted on equitable grounds.

Respectfully submitted,

ROBERT J. FORTIER
By His Attorneys
McLANE, DAVIS, CARLETON & GRAF
By STANLEY M. BROWN

VINCENT D. MARINO and
ANTHONY MARINO
By Their Attorneys
GREEN, GREEN, ROMPREY & SULLIVAN
By MEYER GREEN

No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONEER

v.

ROBERT FORTIER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF

BY

JOHN G. SIMMS
Miami, Florida

Statutes:

Texts and Reports:

No. 14.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ROBERT FORTIER et al.

BRIEF

Amicus Curiae by Elmer G. Doernhoefer.

CONSENT.

The undersigned parties to the above-entitled cause, by and through their respective counsel of record, hereby consent and agree that Elmer G. Doernhoefer shall be permitted to file a brief amicus curiae in the above-entitled cause, provided said brief shall be filed with the Clerk of the Supreme Court on or before October 1, 1951.

(Signed) Philip B. Perlman,
Solicitor General of the United States.

(Signed) Stanley M. Brown,
Counsel for Respondent Fortier.

(Signed) Meyer Green,
Counsel for Respondents Marino.

PRELIMINARY STATEMENT.

Elmer G. Doernhoefer is appellant in the case of Doernhoefer v. United States, No. 14,263, now pending in the United States Court of Appeals, Eighth Circuit. The facts in that case are so substantially similar to the facts in the Fortier case that Doernhoefer has secured the consent of the parties to the latter case to file this brief amicus curiae.

On April 11, 1946, Elmer G. Doernhoefer filed an Application for Preference Rating to secure authorization under the provisions of Priorities Regulation 33 to erect 16 dwelling units in St. Louis, Missouri. The Federal Housing Administration reviewed his application and authorized him to proceed with the project, assigning a project serial number thereto and establishing a maximum sales price for each unit. Doernhoefer started five units in July, 1946, and started five other units in October, 1946. Six units which had not been started by Dec. 23, 1946, were removed from the project and built under Office of Housing Expediter Regulation HPR, issued that date, which removed maximum sales prices. The ten units were completed during the period April to July, 1947, and were deeded to purchasers thereof from May 26, 1947, to August 10, 1947.

On May 8, 1950, approximately three years later, the United States filed an action against Doernhoefer in the United States District Court, Eastern District of Missouri, Eastern Division, alleging that he had made certain unauthorized changes in the construction of said dwelling units, and that five of said dwelling units had been sold at prices in excess of the maximum sales prices fixed by the Federal Housing Administration. Doernhoefer defended that he had made a clerical mistake at the time he requested a price increase on said ten identical units, and said mistake was not discovered until just prior to suit against him. The United States maintained that authority to bring such action was given to the United States by Section 7 (a) of the Veterans Emergency Housing Act of 1946 (60 Stat. 207).

ARGUMENT.

The District Courts Do Not Have Jurisdiction of This Type of Action Because the United States Is Not Entitled to Bring This Type of Action to Recover for Purchasers Sums Paid by Them in Excess of the Maximum Sales Price.

A. There is no specific provision in the Veterans Emergency Housing Act of 1946 authorizing either the United States or the Housing Expediter to bring an action requiring a builder to refund to purchasers amounts paid in excess of the maximum sales prices. It is well settled that where a statute creates a right which provides a special remedy, that remedy is exclusive.[1] The rule is stated in 50 Am. Jur., Statutes, Sec. 596, pp. 593, 594, as follows:

> "It is an established principle, that if a statute creating a new right or cause of action where none existed before, also provides an adequate remedy for the enforcement of the right created, and the statutory remedy is not by its terms cumulative, the remedy thus prescribed is exclusive. In such case the remedy must be pursued in the enforcement of the right to the exclusion of any other remedy."

Section 7 of the Veterans Emergency Housing Act of 1946 provides three different forms of enforcement:

(a) The Expediter may apply to the appropriate court for an order enjoining any acts or practices which constitute or will constitute a violation of Section 5 of said Act, and in such proceeding may secure a permanent or temporary injunction, restraining order or other order;

(b) The United States may bring criminal proceedings to punish willful violations, and

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1 Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165, 174, 175; Arnson v. Murphy, 109 U. S. 238; Barnet v. National Bank, 98 U. S. 555, 558; Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29, 35; United States v. Babcock, 250 U. S. 328, 331.

(c) A person purchasing housing accommodations may, within one year from the date of the occurrence of the violation, bring an action for the amount by which the consideration he paid for such housing accommodation exceeds the maximum selling price, plus reasonable attorneys' fees and costs.

The only remedy specified in said Act to secure a money judgment is the one given to the purchaser of the housing accommodations to bring an action within one year to recover the amount by which the consideration he paid for his housing accommodations exceeded the maximum selling price.

B. **The rule of restitution recognized in the cases of Porter v. Warner Holding Company, 328 U. S. 395, and United States v. Moore, 340 U. S. 616, should not be extended to apply to the Veterans Emergency Housing Act of 1946 because such extension will be greatly against the intent of Congress.** In seeking restitution for violations of the Veterans Emergency Housing Act of 1946 the United States claims authority so to act from Section 7 (a) thereof, which is as follows:

> "Sec. 7 (a). Whenever, in the judgment of the Expediter, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 5 of this Act he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order or other order may be granted, and if granted shall be granted without bond."

The wording of the above section is almost identical to the wording of Section 205 (a) of the Emergency Price

Control Act of 1942 and Section 206 (b) of the Housing and Rent Act of 1947, which have been considered by this Court in the cases of Porter v. Warner Holding Company, 328 U. S. 395, and United States v. Moore, 340 U. S. 616. We recognize that in both those cases this Court has broadly interpreted the meaning of the phrase "or other order" to encompass the power of the Housing Expediter or the United States to seek, and the lower courts to grant, restitution of overcharges.

When Congress enacted the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947 it desired to accomplish purposes substantially different from the purpose it had in enacting the Veterans Emergency Housing Act of 1946.

The purpose of the Emergency Price Control Act of 1942 (56 Stat. 23) is contained in Section 1 (a) thereof, and is as follows:

> "Section 1 (a). It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors and persons dependent on life insurance, annuities and pensions from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities and other institutions and to the Federal, State and local governments;

which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3, and to permit voluntary co-operation between the Government and producers, processors and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board and others heretofore or hereafter created), within the limits of their authority and jurisdiction to work toward a stabilization of prices, fair and equitable wages and cost of production."

The purpose of the Housing and Rent Act of 1947 (61 Stat. 197) is set forth in Section 201 (b) as follows:

"Sec. 201 (b). The Congress, therefore, declares that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas. Such restrictions should be administered with a view to prompt adjustments where owners of rental housing accommodations are suffering hardships because of the inadequacies of the maximum rents applicable

to their housing accommodations, and under procedures designed to minimize delay in the granting of necessary adjustments, which, so far as practicable, shall be made by local boards with a minimum of control by any central agency."

The purpose of the Veterans Emergency Housing Act of 1946 (60 Stat. 207) is set forth in Section 1 (a) of said Act, as follows:

"Sec. 1 (a). The long-term housing shortage and the war have combined to create an unprecedented emergency shortage of housing, particularly for veterans of World War II and their families. This requires during the next two years a house-construction program larger than ever before. The first step toward such a program is to overcome the serious shortages and bottlenecks with respect to building materials, to expedite the production of such materials, to allocate them for house construction and other essential purposes, and to accelerate the production of houses with preferences for veterans of World War II and at sales prices or rentals within their means. To carry out this program, it is necessary to invest a housing expediter with adequate powers, including the power to issue policy directives. Accomplishment of these objectives will assist returning veterans to acquire housing at fair prices, stimulate industry and employment, prevent a post-emergency collapse of values in the housing field, and promote a swift and orderly transition to a peacetime economy."

Thus it will be seen that the main, if not the sole, purpose of the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947 is to prevent inflation and achieve reasonable stability in prices and rents. By contrast the purpose of the Veterans Emergency Housing Act

of 1946 was to promote the largest house construction program ever experienced, in a period of two years. Materials were expedited and allocated for house construction. The program was designed to assist returning veterans to acquire houses at fair prices, stimulate industry and employment, and for other noteworthy purposes. The point is that both the Emergency Price Control Act of 1946 and the Housing and Rent Act of 1947 were merely regulatory Acts designed to keep the economy of the Country in an uninflated status quo. The Veterans Emergency Housing Act was enacted to stimulate industry, employment, accelerate production, encourage building, and to that degree intended to promote certain affirmative action, primarily, of course, by encouraging contractors in providing houses for veterans. A builder who cooperates with the Government's construction program should be accorded different treatment at the hands of the law than a violator of the price or rent control program.

Since the purposes of the Acts are totally dissimilar there is no compulsion upon the Court to give an identical construction to said acts. Such identical construction in fact distorts the intended meaning of the legislation.

A review of the Congressional history and legislative background of the Veterans Emergency Housing Act of 1946 forces the clear conclusion that Congress never intended restitution as one of the enforcement remedies of said Act.

The Veterans Emergency Housing Act of 1946 (H. R. 4761) passed the House of Representatives containing provision authorizing the purchaser to sue for treble damages and authorizing the Housing Expediter to bring an action on behalf of the United States. The Subcommittee on Housing of the Senate, Committee on Banking and Currency, held hearings during the period March 26-30, 1946,

following which Senator Alben W. Barkley, Chairman of the Subcommittee, submitted on April 5, 1946, Report No. 1130 (79th Congress, Second Session), containing a summary of the bill. On page 12 of the Report, Section 7 is as follows:

"(a) Grants the Housing Expediter power to apply to the appropriate Court for orders enjoining acts or practices which would violate the provisions of Section 5, and grants to the Housing Expediter access to the Courts to enforce compliance with the provisions of that Section.

"(b) Provides for a fine of not more than $5,000.00 or imprisonment for not more than a year, or both, for any person convicted of unlawfully violating any provision of Section 5 or of knowingly making statements or entries in the records or reports required to be kept in connection with the maximum sales-price provisions of Section 3.

"(c) Vests in the District Courts jurisdiction of criminal proceedings for violation of the provisions of Section 5 and also vests in the District Courts, concurrently with State and Territorial Courts of all other proceedings under Section 7.

"(d) Provides that if any person selling housing accommodations violates the regulations prescribing the maximum sales-price, the purchaser may bring an action for treble the amount by which the consideration exceeded the maximum sales-price. The time limitation on such actions is one year from the date of the occurrence of the violation. If within sixty days from the date of such violation the buyer fails to bring action, the Housing Expediter is authorized to bring such action on behalf of the United States. The time limitation on any such action is likewise one year from the date of the violation. If any such

action is brought by the Expediter, the purchaser cannot bring an action for the same violation."

It is to be noted that nowhere is made any mention of restitution as being part of the enforcement scheme. It should further be noted that the time limitation of one year on any actions is specifically mentioned twice in said Section 7.

On April 9, 1946, when the Veterans Emergency Housing Act of 1946 was being considered on the floor of the Senate, Section 7 (d) was amended by eliminating the word treble. The Senate further was in doubt as to the exact meaning of the remainder of Section 7 (d), some confusion existing as to what type of an action the Expediter should be authorized to bring.[2]

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2 "Mr. Saltonstall. Mr. President, I should like to ask the distinguished Senator from Kentucky (Mr. Barkley) another question along the lines of the one which I asked yesterday. If the bill is being amended for technicalities in order to improve it, I respectfully call his attention again to Paragraph (d) at the bottom of Page 31 which allows a person to sue for treble damages if he brings suit within a year. On Page 32 there is a provision that if the buyer fails to bring the action under this subsection within sixty days from the date of the violation, the Expediter may bring the action on behalf of the United States within one year from the date of the violation. **The provision does not say whether the Expediter shall bring a criminal or civil action, how much the damages shall be, or to whom that shall be paid.** In another section of the bill the Expediter is authorized to bring criminal actions under certain circumstances. It seems to me that this section, which is a technical section, should be clarified.

Mr. Barkley. Mr. President, we have discussed this question, and I think we can arrive at an understanding about it. As the Senator knows, of course, the treble damage theory, which we discussed yesterday, was originally included in the O. P. A. statute which was intended as a civil penalty against violators of price regulations. It was carried in this bill as a civil penalty on behalf of the aggrieved person. I do not think it is vital to the administration of this bill, and I am perfectly willing to move, on Page 32, Line 1, to strike out the word treble so as to give the aggrieved party the right to bring suit for the amount by which the price has been exceeded.

Mr. Saltonstall. Personally I think it would improve the bill if the word 'treble' were left out; but I think that would not cure the entire technical difficulty, which I would like to see cured.

Mr. Barkley. Is the Senator now referring to the omission of any language stating who shall have the benefit of the recovery if it should be had?

Mr. Saltonstall. That is correct.

Mr. Barkley. At this moment I should not like to offer an amendment on that point, because it may be, under the theory of suits instituted by the Government of the United States, that whatever is recovered should go into the Treasury of the United States; and in that case, the aggrieved person, who had paid the excess, would receive no benefit. I

On April 10, 1946, the Senate was again considering amendments to the bill. On that day, Mr. Barkley offered an amendment limiting the right of the Housing Expediter to bring an action for violations. Mr. Barkley, speaking on behalf of the Senate, stated that he did not consider such a PROVISION important. It was Mr. Barkley's opinion that if the purchaser of a house who has been compelled to pay more than the ceiling price is not willing to bring a suit to recover the difference, the Housing Expediter should not be charged with that obligation.[3]

It should be noted that such provision was not eliminated because the remedy of restitution was available to take care of such a situation. Nowhere is restitution mentioned in the discussion on the Senate floor. There was no sentiment in the Senate that the Housing Expediter or the Government of the United States should bring actions to recover sums for the benefit of purchasers. On

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think we can devise language on that point which will be satisfactory. At this time I should like to have the amendment adopted by eliminating the word 'treble' on Page 32, Line 1.

The President pro tempore. Without objection, the amendment is agreed to." (Emphasis supplied.)

(92 Congressional Record, 1946, Pages 3326, 3327.)

3 "Mr. Barkley. Mr. President, I wish to offer an amendment which I am sure will be agreed to. The amendment is on Page 32, to strike out lines four to nine, inclusive.

The President pro tempore. The amendment offered by the Senator from Kentucky will be stated.

The Legislative Clerk. On Page 32, after Line 3, it is proposed to strike out: 'If the buyer fails to bring an action under this subsection within sixty days from the date of the violation, the Expediter may bring such action on behalf of the United States within one year from the date of the violation. If such action is brought by the Expediter, the buyer shall thereafter be barred from bringing an action for the same violation.'

Mr. Barkley. Mr. President, the language proposed to be stricken out provides if a buyer fails to bring an action under the subsection within sixty days from the date of the violation the Expediter may bring such action on behalf of the United States within one year. **Personally, I do not think it is important. If the purchaser of a house who has been compelled to pay more than the ceiling price is not willing to bring suit to recover the difference, I do not see why the Expediter should be charged with that obligation.** Therefore, I offer the amendment to strike lines four to nine, inclusive, on Page 32.

The President pro tempore. The question is on agreeing to the amendment offered by the Senator from Kentucky (Mr. Barkley).

The amendment was agreed to." (Emphasis supplied.)

(92 Congressional Record, 1946, Page 3430.)

the contrary, it was strongly felt that if the purchaser would not care to bring an action to recover any sum he may have paid in excess of the ceiling price that the Housing Expediter should not be charged with that obligation. The Solicitor General in his Brief for the United States in this case, has stated numerous times that the United States is vis-a-vis the Housing Expediter. We state that certainly the Housing Expediter and the United States are interchangeable parties plaintiff and that it is improper, unjust, unmoral and against the clear intent of the Senate to allow either the Housing Expediter or the United States to bring an action for restitution.

The United States acting for the Housing Expediter should not be permitted to accomplish, under the cloak of seeking equity, a result which either was specifically prohibited from undertaking.

The amendments which were adopted in the Senate eliminated treble damages and eliminated the right of the Expediter to bring an action on behalf of the United States, and they were adopted by conference agreement into the final conference substitute bill, which was then enacted by Congress into the Veterans Emergency Housing Act of 1946 (House Report No. 2000, May 10, 1946, 79th Congress, Second Session).

In United States v. Moore this Court followed the broad interpretation of the phrase "or other order" given in Porter v. Warner Holding Company. In the latter case, 328 U. S. 395, at p. 403, the Court stated that the proposed exercise of the equity jurisdiction (by granting restitution) is consistent with the statutory language and policy, the legislative background, and the public interest. It is more than clear that when considering the Veterans Emergency Housing Act of 1946 the exercise of any equity jurisdiction by granting restitution would be absolutely inconsistent with and contradictory to the express dec-

larations of Congress. This one fact in itself is sufficient reason why the doctrine of restitution as applied in the case of Porter v. Warner Holding Company, should not be extended to the Veterans Emergency Housing Act of 1946.

CONCLUSION.

Congress, in enacting the Veterans Emergency Housing Act of 1946 set up as complete a scheme of enforcement as it felt necessary. Where Congress has provided remedies, these remedies are exclusive. It would be flaunting the will of Congress for the United States, or vis-a-vis the Housing Expediter, the real party in interest, to be permitted to do by indirection what he has been specifically forbidden to accomplish directly. The Senate granted necessary remedies in its enforcement scheme. It considered others not important. It felt that if an injured person was not sufficiently concerned with his damage to file an action in his own behalf to recover for damages, with attorneys' fees and costs, that it should not be the obligation of the Housing Expediter vis-a-vis the United States, to be charged with the obligation of recovering such damages for him.

Respectfully submitted,

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INDEX

CITATIONS

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N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF

INTRODUCTION

The opinions below, jurisdiction, statutes, regulations d facts involved, being fully covered in the briefs of the rties to the cause, will be mentioned here, when neces- ry, by reference; the Veterans' Emergency Housing Act 1946, as the "Veterans' Act", the Housing and Rent t of 1947, as the "Rent Act", the Second War Powers t, as the "War Act", the Emergency Price Control Act 1942, as the "Price Act", and the Act of March 22, 1944 the "Savings Clause Act".

QUESTIONS PRESENTED

I

Can the United States maintain an action for restitution to veterans of the purchase price in excess of the maximum set under the laws governing the Veterans' Emergency Program prior to June 30, 1947 on sales of houses effected subsequent to said date?

II

Did the maximum sales prices, established under the "Veterans' Emergency Housing Act of 1946", cease on June 30, 1947, as to houses not then sold?

ARGUMENT

I

THE UNITED STATES CANNOT MAINTAIN AN ACTION FOR RESTITUTION TO VETERANS OF THE PURCHASE PRICE IN EXCESS OF THE MAXIMUM SET UNDER THE LAWS GOVERNING THE VETERANS' EMERGENCY HOUSING PROGRAM PRIOR TO JUNE 30, 1947 ON SALES OF HOUSES EFFECTED SUBSEQUENT TO SAID DATE.

A cause of action for restitution did not exist on June 30, 1947 when the "Veterans' Act" was repealed because no excess purchase price had been paid and received at that time. This is obvious.

A mere agreement to receive excess purchase price could not give rise to an action for restitution for the same

simple reason. Even an agreement for more than the ceiling price made during the life of the statute and consummated by deed to the purchaser and a mortgage back to the seller, would not result in an action for restitution, although the mortgage could be reformed in equity and the purchaser and mortgagor credited with the excess purchase price, (Helms, et al v. Mullin, et al (Fla.) 41 Southern (2nd) 443).

On June 30, 1947, when the "Veterans' Act" was repealed by the "Rent Act", no one had a cause of action against the defendants for restitution of overcharge because no overcharge had occurred at that time. Hence, no cause of action for restitution could have been preserved by any saving clause or statute.

This Court dealt with a similar situation in The Bank of Hamilton v. The Lessee of Ambrose Dudley, 7 L. ed 496. An Order authorizing and directing administrators to sell property of an estate in Ohio had been entered by the Probate Court. Before the administrators could sell the property, the statute, under which the Court made the Order, was repealed. The Court held that a sale subsequent to the repeal of the law was ineffective. Head note No. 4 of said opinion is:

> "Where administrators, acting under the provision of an Act of Assembly of the State of Ohio, were ordered by the court, vested by the law with the power to grant such order, to sell real estate, and before the sale was made the law was repealed, the powers of the administrators to sell terminated with the repeal of the law."

Judge Marshall said:

> "if the law which authorized the Court to make the order be repealed, the power to sell can never come into existence. The repeal of such law devests no vested estate, but is the exercise of a legislative power which every Legislature possesses."

In Charles v. Lamberson, 1 Iowa 435, 63 Am. Dec. 457, it was held: "To constitute Homestead, under Iowa Act of 1849, exempting Homestead from forced sale, there must have been both ownership and occupation of the premises during the existence of the law", the Court saying as to the claimant: "Until he was in a situation to be protected by the law, no right had accrued or become vested; and when the law was repealed, he stood just as he would though the law had never been enacted."

> "In any event the unqualified repeal of a statute conferring civil rights or powers operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unperfected, or which have not accrued or become vested." (50 Am Jur, para. 526, page 533)

We must remain cognizant of the truth that at the time of the sales involved the "Veterans' Act" and the "War Act", were not in existence. It would seem axiomatic that no violation of a statute could take place after its' repeal; that no cause of action could accrue under a statute or be preserved by a savings clause or statute on the basis of an act committed afer the repeal of the statute.

II

The MAXIMUM SALES PRICES, ESTABLISHED UNDER THE VETERANS' EMERGENCY HOUSING ACT OF 1946, CEASED ON JUNE 30, 1947, AS TO HOUSES NOT THEN SOLD.

But it is earnestly claimed by the United States that because the defendants agreed in their applications under the "Veterans' Act", for the privilege of constructing the houses, to sell them to veterans for not more than set figures, they were obligated, after the repeal of said Act, to sell according to said applications.

This overlooks the fact that the maximum sales prices on houses were under a program for and during a critical period *only*.

When the program was no longer necessary on June 30, 1947, it was then ended by the repeal. The Congress was not disturbed by the fact that some builders would profit by the lifting of the ceiling prices because it was not individual interest but the over all national interests that caused the program. When the program ended, there was no need or occasion to carry it on as to individual incomplete transactions. To the extent that Congress deemed advisable and in the modified form, *minus the ceiling price provisions*, Congress provided for a future Veterans' Housing Program in the "Rent Act." This, as shown by the lower Court, strongly indicated the intent of Congress to do away with the maximum sales prices. By this time, the housing for sale and rent was adequate, or so nearly so as require this modification in the program.

During the difficult period of May, 1946, when Congress passed the "Veterans' Act", the provision it made in Section 5 for preservation of rights and liabilities was strong and clear. The "Act and all regulations and orders issued thereunder shall be treated as remaining in force, as to rights and liabilities incurred or offenses committed prior to such termination date."

Then in June of 1947, when housing accommodations were not so scarce and conditions not so severe as in May, 1946, Congress expressly repealed said Section 5 and all other sections of the "Veterans' Act" dealing with price ceilings, substituted a new program for the future and as to the past merely provided "That any allocations made or committed, or priorities granted for delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of the enactment of this Act, with respect to Veterans of World War II, their immediate families, and others, shall remain in full force and effect."

Assuming that the language just quoted is abstruce and does not merely mean that allocations, priorities and commitments of housing materials are to remain intact, by what method can it be made to mean that maximum sales prices set under the "Veterans' Act" are to continue in force?

Congress had found no difficulty in the saving clause worded in Section 5 of the "Veterans' Act", none in the "Price Act" and none in the "Savings Clause Act." Did Congress speak in parable, and if so, who is the Daniel to read the enigma?

It is respectfully submitted that the language of the proviso must be given its' ordinary meaning and if this is found unsatisfactory, then it should be discarded. The citizens of this country should never be misled and bound by hidden meaning in law!

Certainly this language does not mean that the "Veterans" Act" is to continue on as to "all business on hand" at the close of business on June 30, 1947. Nor can the words of the "Savings Clause Statute" carry such an enlarged meaning.

Any regulation or order inconsistent with the statute under which it was issued is a nullity. (Manhattan vs. Commissioner of Internal Revenue, 80 L. ed, 1010)

Respectfully Submitted

JOHN G. SIMMS

Amicus Curiae

September 1951.

No. 14.

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SUPREME COURT OF THE UNITED STATES.

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BRIEF

Amicus Curiae by Elmer G. Doernhoefer.

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